Supreme Court, U.S.
- FILED

00 422 SEP 13 2000

No. --- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NATIONAL WHISTLEBLOWER CENTER,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Stephen M. Kohn
Counsel of Record
National Whistleblower Legal
Defense and Education Fund
3233 P Street, N.W.
Washington, D.C. 20007
(202) 342-1903 (Phone)
(202) 342-6984 (Fax)

2 12 pp

QUESTIONS PRESENTED

1. Whether the Administrative Procedure Act, 5 U.S.C. §§ 551-558, governs the Nuclear Regulatory Commission's conduct of adjudicatory proceedings under §189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A)?

2. Whether the Nuclear Regulatory Commission may ignore the procedural safeguards set forth in the Administrative Procedure Act, 5 U.S.C. § 554 when conducting a licensing proceeding required under §189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A)?

3. Whether the Nuclear Regulatory Commission has the discretion under §189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A) to adopt interpretations of regulations which contradict the plain meaning of the regulation, ignore prior interpretations of a rule, and apply a rule in an inconsistent and prejudicial manner?

CORPORATE DISCLOSURE STATEMENT

The Petitioner, National Whistleblower Center, is a § 501(c)(3) not for profit corporation. The National Whistleblower Center has no parent corporation and is not owned, wholly or in part, by any publicly-traded corporation.

TABLE OF CONTENTS

Questions Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statutory and Regulatory Provisions Involved 2

Statement of the Case 2

I. Procedural Posture 3

II. Relevant Factual Background ...7

Reasons for Granting the Petition 11

I. The decision below raises an exceedingly important question of law 14

II This court should grant certiorari to resolve conflicts and ambiguities in the decisions of the United States Courts of Appeal and the NRC 18

Conclusion 26

TABLE OF AUTHORITIES

Cases:

City of West Chicago v. Nuclear Regulatory Commission, 701 F.2d 632 (7th Cir. 1983). 19, 21

National Whistleblower Center v. Nuclear Regulatory Commission, Order denying rehearing (June 15, 2000). 1, 7

National Whistleblower Center v. Nuclear Regulatory Commission, 208 F.3d 256 (D.C. Cir. 2000) 1, 6

National Whistleblower Center v. Nuclear Regulatory Commission, 196 F.3d 1271 (D.C. Cir. 1999) 6

National Whistleblower Center v. Nuclear Regulatory Commission, No. 99-1002, slip op. (D.C. Cir. 1999) *vacated*, 196 F.3d 1271 . . . . . *passim*

Norwegian Nitrogen Products Co. v. United States, 285 U.S. 294, 53 S.Ct. 350 24

Power Reactor Dev. Co. v. Int'l Union, 367 U.S. 396, 81 S.Ct. 1529 (1961) 24

Siegel v. Atomic Energy Commission, 400 F.2d. 778 (D.C. Cir.1968). 11,19, 20

Union of Concerned Scientists v.
Nuclear Regulatory Commission,
735 F.2d 1437 (D.C. Cir. 1984) 20, 21, 22

Union of Concerned Scientists v.
Nuclear Regulatory Commission,
920 F.2d 50 (D.C. Cir. 1990) 22

Vermont Yankee Nuclear Power Corp. v.
Natural Resources Defense Council,
435 U.S. 519, 98 S.Ct. 1197 (1978) . . . . . *passim*

Wong Yang Sung v. McGrath,
339 U.S. 33, 70 S.Ct. 455 (1950) 13

Administrative Decisions:

In re Arizona Public Service Company,
34 N.R.C. 149 (1991) 7

In re Baltimore Gas and Elec. Company,
48 N.R.C. 325 . . . . . *passim*

In re Baltimore Gas & Electric Company,
48 N.R.C. 134 . . . . . 5, 11

In re Baltimore Gas & Electric Company,
48 N.R.C. 45 4

In re Baltimore Gas & Electric Company,
48 N.R.C. 39 . . . . . .3, 10, 15

In re Duke Power,
16 N.R.C. 460 8

In re Envirocare of Utah, Inc.,
35 N.R.C. 167 (ASLB 1992) 8

Statutes and Regulations:

5 U.S.C. § 554 *et seq* . . . . . *passim*

5 U.S.C. § 554(b)(3) 15, 16

5 U.S.C. § 558 *et seq*. . . . . *passim*

28 U.S.C. § 1254(1). 2, 3, 7

28 U.S.C. § 2342(2) 6

42 U.S.C. § 2239(a)(1)(A). . . . . i, 2

10 C.F.R. § 2.711 . . . . . 2, 9, 15, 16

10 C.F.R. § 2.714(a)-(c). 2, 8

Other Authorities:

54 Fed. Reg. 33168 (Aug. 11, 1989) 7

63 Fed. Reg. 20663 (April 27, 1998) 8

63 Fed. Reg. 36966 (July 8, 1998) 3, 10

Parler, William C., "Memorandum: OGC Analyses
of Legal Issues Relating to Nuclear Power
Plant Life Extension," Jan. 13, 1989 . . . . . *passim*

Layton, Lyndsey, "Nuclear Plants Watching Calvert Cliffs License Bid," *The Washington Post*, p. 1A (April 1, 1999). 4, 9

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Whistleblower Center ("Whistleblowers") respectfully petitions this Court to exercise its *certiorari* jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *National Whistleblower Center. v. Nuclear Regulatory Commission, et al.*, No. 99-1002, reported below at 208 F.3d 256 (D.C. Cir. 2000).

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is reported at 208 F.3d 256, and is reprinted in the appendix hereto. The D.C. Circuit's order denying rehearing *en banc* and for reconsideration is not reported, and is reprinted in the appendix hereto.

The Nuclear Regulatory Commission order denying Whistleblowers' petition in the underlying administrative proceeding is reported at *In Re Baltimore Gas & Electric Co.*, 48 N.R.C. 325 (December 23, 1998), and is reprinted in the appendix hereto.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered judgment on April 11, 2000. *National Whistleblower Center v. Nuclear Regulatory Commission*, 208 F.3d 256 (D.C. Cir. 2000); App. 1a. The National Whistleblower Center's petition for rehearing and rehearing en banc was denied by the Court of Appeals on June 15, 2000. *National Whistleblower Center v. Nuclear Regulatory Commission*, No. 99-1002, Order Denying Petition For Rehearing (D.C. Cir. June 15, 2000); App.123a. The

United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

The following statutes and regulations are involved in this case. Due to their length, the pertinent sections of their text shall be set forth in the appendix, at the corresponding page numbers:

42 U.S.C. § 2239(a)(1)(A) 124a

5 U.S.C. § 554 ..... 126a

5 U.S.C. § 558 ..... 129a

10 C.F.R. Part 2 § 2.711 ..... 131a

10 C.F.R. Part 2 § 2.714(a)-(c) 132a

STATEMENT OF THE CASE

This case arises under Section 189 of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A), and presents issues of national importance regarding the first contested safety proceeding adjudicating whether a utility's license to operate a commercial nuclear power facility should be renewed for an additional 20 years period.

At issue are the Nuclear Regulatory Commission's ("NRC") actions in conducting a safety-related licensing proceeding during the course of Baltimore Gas & Electric Company's ("BG&E's") application for an operating license renewal for its Calvert Cliffs Nuclear Power Plant.

Specifically, this Court must determine whether the provisions of the Administrative Procedure Act ("APA") apply to adjudications brought under Section 189 of the Atomic Energy Act. This decision will impact numerous renewal proceedings which will occur nation-wide over the next twenty-five years.

I. Procedural Posture

On July 8, 1998, the NRC published a notice in the *Federal Register* giving notice to the public that interested persons could petition to intervene in the license renewal application proceeding for the Calvert Cliffs Nuclear Power Plant, Units 1&2. App. 26a.

Petitioner National Whistleblower Center ("Whistleblowers") initiated this case on August 7, 1998, when it petitioned the NRC to intervene in the license renewal proceeding for the Calvert Cliffs facility. App. 26a.[1/]

Twelve days later, on August 19, 1998, the NRC Commission issued an order referring the Whistleblowers' petition to an Atomic Safety and Licensing Board Panel ("ASLB"), comprised of two scientific experts and one administrative law judge, for adjudication of the issues pertaining to the Whistleblower's intervention petition. App. 115a.

In its August 19 referral order, the Commission gave "guidance" to the Panel by, *inter alia*, dictating strict procedural rules which would govern the proceeding. These mandates conflicted with long-standing regulations governing licensing proceedings which had been published in the Code of Federal Regulations. App. 35a-36a.

[1/] The procedural history of this case before the Nuclear Regulatory Commission is set forth in App. 26a-31a.

On August 24, 1998 Whistleblowers petitioned the Commission for interlocutory relief from portions of its August 19th referral order. App. 105a. This appeal was based, in part, on the failure of the Commission to comply with the adjudicatory rules set forth in the Administrative Procedure Act, 5 U.S.C. § 554-558. App. 126a-130a. The Commission denied this interlocutory appeal and mandated that Whistleblowers adhere to all of the "guidance" contained in the August 19th order. App. 103a.

On August 20, 1998, the Atomic Safety and Licensing Board Panel issued an Initial Prehearing Order in which it implemented the Commission's "guidance." A deadline for the filing of proposed contentions was set for September 11, 1998. Whistleblowers promptly requested until November 15, 1998 to file its list of proposed contentions. App. 99a. Specifically, Whistleblowers requested that the initial hearing in the proceeding be scheduled for on or after December 1, 1998, and that the deadline for filing contentions be set for 15 days prior to the hearing date. *Id.* This request was based on the need of Whistleblowers to work with nationally recognized experts in order to properly formulate the required safety-related contentions.

As explained in the now vacated decision issued by Judge Wald: "Whistleblower based the motion on its need to retain experts to review the application and provide necessary technical input, the complexity of the three-volume relicensing application and the fact that this proceeding would inevitably involve novel issues since it was the first nuclear power reactor license renew proceeding ever." App. 28a.

The ASLB denied Whistleblowers' motion. App. 28a. Whistleblowers filed an interlocutory appeal of this denial directly to the Commission. The Commission also rejected Whistleblowers request to permit its experts until the 15th of November to complete their technical review of BG&E's

application and submit formal contentions. App. 28a, 94a, and they set a new deadline, September 30, 1998, for the filing of contentions.

The refusal of the Board and Commission to permit Whistleblowers to file its contentions on November 15, 1998 was inconsistent with prior NRC case precedent:

> "The Commission's rejection of Whistleblowers' asserted justifications for an extension of time – the need for its experts to study the voluminous application to formulate contentions and the novelty and complexity of issues raised by the application in the context of the first license renewal proceeding for a nuclear power plant -- is also inconsistent with prior NRC cases in which the Commission has granted extensions of time based on the complexity of issues involved or the need to give experts time to review an application, or both."

App. 36a.

Despite "scrambling to come up with the most specific contentions it could within the short time it had to file," Whistleblowers were unable to submit admissible contentions by the deadlines imposed by the Board and Commission. App. 45a. On October 16, 1998 the ASLB dismissed Whistleblowers' claims. App. 77a. This dismissal was affirmed by the Commission on December 23, 1998. App. 47a. The Commission rejected Whistleblowers' argument that the Administrative Procedure Act's provisions concerning adjudications applied to proceedings under § 189(a) of the Atomic Energy Act. App. 60a-61a, n. 4.

Under 28 U.S.C. § 2342(2), the NRC's final orders under the Atomic Energy Act are appealable directly to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). Pursuant to § 2342(2), the Whistleblowers filed two timely petitions for review with the D.C. Circuit, on January 4, 1999 and February 8, 1999. The individual petitions were consolidated by the D.C. Circuit on March 31, 1999.

On November 12, 1999, a divided panel of the D.C. Circuit issued its opinion, finding for the Whistleblowers. App. 24a. The Court found that the NRC had impermissibly swerved from its established precedent and that the record supported a finding that Whistleblowers were potentially prejudiced by the actions of the Commission. The Court vacated the Commission's orders and remanded the case for further proceedings. App. 46a.

Shortly thereafter, Circuit Judge Patricia Wald, the author of the panel's November 12 opinion, retired from the D.C. Circuit. Ten days later, on November 22, 1999, the remaining two judges from the original panel *sua sponte* vacated the panel's original decision. App. 20a. The Court vacated Judge Wald's decision on the proposition that the Commission was virtually free to adopt any procedures it saw "fit" in the Calvert Cliffs license renewal procedure. App. 22a.

The case was reargued on March 2, 2000, and on April 11, 2000 a new panel consisting of the remaining two members of the original panel plus a new member issued its decision, finding against the Whistleblowers. App. 1a-19a. The new panel held that the Commission had discretion to change "adjudicatory" rules, essentially at-will. App. 10a-11a.

The Whistleblowers filed a motion for rehearing and rehearing *en banc* with the D.C. Circuit, and the court denied that motion on June 15, 2000. App. 123a. Pursuant to 28 U.S.C. § 1254(1), the Whistleblowers filed the instant Petition

for *Certiorari* with the United States Supreme Court on September 13, 2000.

II. Relevant Factual Background

The facts relevant to this Petition and the case below are quite straightforward. On August 20, 1998 the Atomic Safety Licensing Board Panel ("ASLB" or "Panel") set forth a schedule in which Whistleblowers were required to file all of their contentions and the bases therefore by September 11, 1998. App.98a. The NRC's regulation governing contentions placed a heavy burden upon the Whistleblowers to review, digest and critique extremely dense and complex scientific material. *See, e.g.* 10 C.F.R. § 2.714(b)(2)(i)-(b)(2)(iii); App. 132a.

The modern contention rule, which was enacted in 1989, was explicitly designed to heighten the pleadings burden on intervenors, make it even more difficult to formulate contentions. *See, e.g. In re Arizona Public Service Company*, 34 N.R.C. 149, 155-56 (1991); *see also* 54 Fed. Reg. 33168, 33170 (Aug. 11, 1989).

The contentions rule is strictly enforced, and there is no procedure to supplement or amend contentions similar to those found in Fed. R. Civ. P. Rule 15, for example. Consequently, given the substantial burden on intervenors to formulate contentions, it was well recognized, even prior to the 1989 amendments that raised the contention pleading standard, that intervenors often needed additional time to work with experts in formulating proper and publicly useful contentions. *See, e.g. In re Duke Power*, 16 N.R.C. 460, 466 (1982).

Thus, in this case, Whistleblowers were required to submit a contention, with proper justification, for each and every safety concern implicated by BG&E's request to operate two nuclear power units for an additional 20 years.

Whistleblowers were initially given sixteen working days notice of this deadline.

Consistent with common practice in licensing proceedings, Whistleblowers promptly requested additional time to file its contentions and informed the Commission that it needed until November 15, 1998 for its experts to review the application and formulate contentions. App. 27a; 99a.

It is uncontested that in prior proceedings such additional time would most likely have been granted as a matter of course. App. 36a-37a (collecting cases). The licenses for Calvert Cliffs were not scheduled to expire for an additional 16 and 18 years, respectively, *see* 63 Fed. Reg. 20663, 20664 (April 27, 1998), and Whistleblowers merely needed an additional 64 days to complete their expert review. In fact, prior to the Calvert Cliffs proceeding, intervenors in far less complex licensing proceedings were granted over 300 days from the initial prehearing order to formulate contentions. *See, e.g. In re Envirocare of Utah Inc.*, 35 N.R.C. 167 (ASLB 1992).

The Calvert Cliffs proceeding marked the first major licensing case in which the Commission would ignore its own adjudicatory regulations published in 10 C.F.R. Part 2, and conduct the proceedings under rules below the minimum procedural requirements set forth in the Administrative Procedure Act's adjudicatory standards. This shift in procedure was highlighted by the Commission's decision to shorten the amount of time intervenors would have to formulate contentions.

Under prior regulations, the Commission recognized the intervenors regularly needed extra time to formulate proper contentions. Since 1962 the Commission had committed to a "good cause" standard when evaluating how much additional time intervenors should be provided when necessary to formulate contentions and bases in the complex nuclear safety

proceedings. App. 35a (procedure designed to ensure "fair and impartial consideration of issues" not unduly "sacrificed" due to scheduling pressures). However, in the Calvert Cliffs proceeding, without even bothering to amend its published regulations, codified at 10 C.F.R. § 2.711, the Commission ordered that the ASLB deny any request for additional time to formulate contentions, unless Whistleblowers could demonstrate "unavoidable and extreme circumstances." App. 100a. This standard was imposed without any justification on the record in the Calvert Cliffs proceeding. The standard was also applied in an inconsistent and highly prejudicial manner. App. 39a (NRC interpreted new rule "in different ways depending on whose interest was at stake"). Whistleblowers had never applied for any enlargement of time and there was no evidence of any prior abuse of process.

Despite the new rule, Whistleblowers informed the ASLB that their experts needed until November 15, 1998 to formulate contentions and provided specific justifications for which, in prior proceedings clearly would have constituted "good cause" based on the need for expert testimony in complex NRC safety proceedings. App. 36a-37a. However, the ASLB ignored all of the justifications provided by Whistleblowers regarding the needs of their experts, ignored all of the prior case law interpreting standard time requirements for formulating contentions, failed to weigh any of the factors commonly used by courts to consider whether "good cause" existed, and mechanistically applied the new "unavoidable and extreme circumstances" standard. The request for enlargement was summarily denied. App. 28a, 98a.

The proceeding essentially ended at that moment. The record clearly indicated that Whistleblowers could not formulate proper contentions prior to November 15, 1998. On September 11, 1998, instead of filing contentions, Whistleblowers filed an interlocutory appeal of the ASLB's

denial. The Commission affirmed the ASLB's use of the "unavoidable and extreme circumstances" standard, and affirmed the Board's refusal to grant Whistleblowers' experts until November 15th to conduct their review.[2/] After the Commission affirmed the ASLB's action, Whistleblower's commenced "scrambling" to formulate contentions. App. 45a. Their efforts were futile, and no proper contentions were timely filed. *Id.* The ASLB promptly canceled the scheduled prehearing conference and dismissed the proceeding, without ever holding even one public hearing. App. 77a; 30a-30b.

Whistleblowers appealed the ASLB's dismissal to the Commission. Whistleblowers again relied upon the Administrative Procedure Act's rules regarding adjudications and argued that the new procedures used in relicensing cases violated the APA and case law interpreting that statute. The

---

[2/] The Commission did, *sua sponte* enlarge the filing date for contentions from September 11, 1998 to September 30, 1998. This enlargement had no practical effect on the Whistleblowers' needs and did "little to remove any prejudice" Whistleblowers had already suffered. App. 44a. The Commission's *sua sponte* enlargement was actually intended to cure another procedural problem caused by the NRC's new regulatory scheme. In the notice of hearing published in the Federal Register, the NRC informed potential intervenors (including Whistleblowers) that they could file contentions at any time up to 15 days prior to the prehearing conference. 63 Fed. Reg. 36966 (July 7, 1998). The ASLB had also failed to adhere to that published requirement. The Commission noted that problem, and the possibility that Whistleblowers "might not have anticipated that the Board would set a date as early as September 11" for the contentions deadline, and simply reset the deadline to conform with the 15 day notice previously provided the public in the Calvert Cliffs proceeding. App. 95a.

Commission rejected the appeal and clearly held that the APA's adjudicatory requirements did not apply to nuclear hearings conducted under § 189 of the Atomic Energy Act. App. 60a, n. 4. This holding conflicted with prior D.C. Circuit decisions, *see, e.g. Siegel v. Atomic Energy Commission*, 400 F.2d 778 (D.C. Cir. 1968), and directly contradicted a detailed public position paper previously issued by the General Counsel of the NRC. App. 136a.

REASONS FOR GRANTING THE PETITION

This Court should exercise its *certiorari* jurisdiction to review the decision below and conclusively answer the following important question: whether the Administrative Procedure Act's adjudication provisions apply to nuclear safety proceedings conducted under Section 189(a) of the Atomic Energy Act?.

Over twenty years ago, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197 (1978), this Court agreed to review two similar decisions of the United States Court of Appeals for the District of Columbia Circuit. This Court was concerned that the D.C. Circuit had "seriously misread or misapplied" the law which cautioned courts against "engrafting their own notions of proper procedures upon agencies." *Id.*, 435 U.S. at 525, 98 S.Ct. at 1202.

To clarify the apparent confusion among the federal Courts of Appeals, and to prevent those courts from misapplying the law, this Court held that the APA and its safeguards apply to administrative rulemaking proceedings brought under the Atomic Energy Act.

Today, the state of the law is in similar disarray, because the lower federal courts neither assume nor decide in a consistent manner whether the APA applies to adjudicatory

proceedings under the Atomic Energy Act. The harm resulting from this disarray is magnified by the large number of nuclear plants which will be applying for license renewals. *See* Lyndsey Layton, "Nuclear Plants Watching Calvert Cliffs License Bid," *The Washington Post*, p. 1A (April 1, 1999).

Petitioner asks for no more and no less in this case than the step this Court took in *Vermont Yankee*. This case reflects the same troubling problems seen there, because now, instead of engrafting its own notions of proper procedure upon NRC proceedings and requiring more procedure than the APA mandates, the court below failed to ensure that the minimum floor set by the APA was established, and upheld, *sub silentio*, the NRC's ruling that the APA does not apply to its adjudicatory proceedings, effectively allowing the NRC to give less procedure than the APA would require.

Just as this Court reviewed the *Vermont Yankee* case to clarify once and for all that the APA applies to rulemaking proceedings, it should now grant this petition to settle whether the APA likewise applies to NRC adjudicatory proceedings. In so doing, the Court should ultimately determine that the public must, at the very least, be given the basic level of consideration Congress intended when it enacted the APA in 1946.

As this Court stated a half-century ago, and reiterated in *Vermont Yankee*, the APA "settled long-continued and hard fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." 435 U.S. at 523, 98 S.Ct. at 1201, *quoting Wong Yang Sun v. McGrath*, 339 U.S. 33, 40, 70 S.Ct. 445, 448 (1950). Neither an agency nor a federal court should be able to manifestly disregard that compromise by virtue of a wide-ranging misreading of the law.

Moreover, and closely related to the important questions this case raises, the uncertainty and conflicting opinions of the lower courts and the NRC itself, as to the applicability of the APA in adjudicatory proceedings under the

Atomic Energy Act, demonstrates the pressing need for this Court to make a pronouncement on this issue.

Although the Commission, below, held that "it had reiterated several times in recent years" that "NRC licensing proceedings are not governed by APA requirements for formal on-the-record adjudications," App. 60a, n. 4, the Commission's actual historic position on this question is anything but clear. In 1968 the Commission unequivocally stated that the APA requirements were applicable in cases such as the Calvert Cliffs proceeding. App. 171a-172a. Moreover, as recently as January 13, 1989, NRC General Counsel William C. Parler issued a detailed public analysis of the legislative history and public policies underlying the Atomic Energy Act, and strongly recommended that the Commission hold that APA adjudicatory requirements were applicable to nuclear safety relicensing proceedings. App. 136a. According to Parler, "It is clear that the AEC, and later the NRC, have long interpreted Section 189 as requiring formal hearings for licensing proceedings." App. 171a.

Based on an exhaustive review of the applicable case law and legislative authorities, the General Counsel concluded that the "better view is to require any necessary hearing be a formal one conducted in accordance with the 'on the record' hearing requirements of the Atomic Energy Act." App. 145a. The General Counsel's opinion should not be disregarded lightly. It is based on a through and objective review of the controlling authorities, and clearly considered Congress' understanding that nuclear safety hearings were intended to be complex proceedings, in which expert witnesses would have a vital role.

Permitting the Commission to jettison, at will, the procedural rights guaranteed by the APA, would unquestionably negate the intent of Congress. Simply stated, without permitting the public intervenors to formulate

scientifically sound contentions in this ultra-complex technological area, the entire hearing process would be useless and hollow.

For these reasons, as set forth below, Petitioner respectfully requests that this Court grant this petition and review the D.C. Circuit's decision in this matter.

I. The Decision Below Raises An Exceedingly Important Question of Law.

In its final order dismissing the proceeding, reprinted in the appendix hereto, the NRC relied upon this Court's decision in *Vermont Yankee* for the proposition that it possessed "broad regulatory latitude" to set forth its own "rules of procedure and methods of inquiry," and went on to directly hold that the APA did not bind the Commission's actions in licensing proceedings. *See In the Matter of Baltimore Gas & Electric Company*, Memorandum & Order, 48 N.R.C. 325 (Dec. 23, 1998), App. 60a, n. 4.

The Commission was simply wrong. Its flawed understanding of *Vermont Yankee* tainted the entire proceeding below and created an unreasonable regime which prejudiced the Whistleblowers' ability to represent the public interest and participate in a meaningful way.

Here, the "procedure" that was granted to the Whistleblowers in the case below illustrates the NRC's misunderstanding of the law. For example, on August 19, 1998, the Commission referred Whistleblowers' intervention petition to an Atomic Safety and Licensing Board Panel ("Panel") for adjudication. *See In the Matter of Baltimore Gas & Electric Co.*, Order Referring Petition for Intervention, 48 N.R.C. 39 (August 19, 1998). The Whistleblowers immediately filed an interlocutory appeal challenging several aspects of the Commission's referral order.

Key among the Whistleblowers' objections were the Commission's failure to structure the proceeding, taking into consideration "due regard" for the "rights and privileges of all the interested parties or adversely affected persons," 5 U.S.C. § 558(c), and the "convenience and necessity of the parties and their representatives." 5 U.S.C. § 554(b)(3). For example, Whistleblowers vigorously opposed the Commission's unilateral decision to override its own published regulations and set forth a new standard, previously unprecedented in NRC agency law, requiring the hearing officers to reject any request for an enlargement of time which did not meet the new "unavoidable and extreme" standard.

This standard was inconsistent with all prior NRC case law, App. 36a-38a, facially conflicted with the Commission's own regulation published in 10 C.F.R. § 2.711, and undermined Whistleblowers' rights to have the proceeding adjudicated in a manner consistent with the APA adjudicatory provisions.

Whistleblowers were prejudiced by the application of this "unavoidable and extreme" circumstances standard. Specifically, on August 20, 1998 Whistleblowers informed the NRC that it was unable, within the extremely short time frames unilaterally imposed by the NRC without any input from the parties, to retain the necessary experts "to review the BG&E license renewal applications and have those experts provide it with the necessary technical input to frame its contentions." App. 99a. Whistleblowers informed the NRC that these experts needed until November 15, 1998 to complete their technical review. App. 99a.

Under prior NRC case law consistently applied to licensing proceedings, this enlargement would most likely have been granted. App. 36a-38a. Moreover, had the Commission applied its own published regulation which controlled extensions of time, 10 C.F.R. § 2.711, the enlargement would

have been granted. Id. However, the NRC ignored its prior case law, its published regulation and the requirements of the APA, and denied the request. This denial was highly prejudicial, for it prevented the Whistleblowers from utilizing any experts in drafting the necessary contentions. As a direct result of this ruling and the expedited timetable, Whistleblowers were unable to present any valid contentions. App. 43a-46a.

This order directly contravened the mandates expressly set forth in the APA, including the obligation of the NRC to conduct its proceedings in a manner consistent with the "rights and privileges of all . . . affected persons" and the obligation of the NRC to fix the time and place for hearing only after taking into consideration the "convenience and necessity of the parties." *See* 5 U.S.C. §§ 554(b)(3) and 558(c).

Moreover, the order violated settled case law controlling APA-type adjudicatory proceedings. These well-established rules prohibit agencies from engaging in the variety of conduct which was prevalent in the proceeding below. This included the Commission exceeding its interpretive authority to constructively rewrite a regulation, App. 38a, adopting interpretations of regulations which contradict the plain meaning of the regulation, App. 32a-36a, ignoring prior interpretations of a rule, App. 35a-38a, and, applying a rule in an inconsistent and prejudicial manner. App. 39a.

During the pendency of the proceeding before the NRC, the Whistleblowers relied upon and repeatedly reaffirmed their position that the Commission's referral order, and all of the subsequent NRC rulings which were based on the legal standards set forth therein, violated various aspects of the APA. The Commission never applied the adjudicatory provisions of the APA to the proceedings below, and simply held that under the Atomic Energy Act the Commission was not required to follow these rules.

Moreover, the Commission and the Court of Appeals repeatedly and erroneously relied upon *Vermont Yankee* to justify the Commission's use of adjudicatory procedures without any reference to the safety net provided by the APA and the case law interpreting the APA.

This case raises an important question because the issues raised herein will impact a substantial number of nuclear safety proceedings conducted nationwide under Section 189(a) of the Atomic Energy Act. The Calvert Cliffs proceeding was merely the first of numerous relicensing proceedings which will be ultimately be conducted. The precedent set in this case will directly impact 102 other nuclear plants which could also apply for a license extension. *See* Lyndsey Layton, "Nuclear Plants Watching Calvert Cliffs License Bid," *The Washington Post*, p. 1A (April 1, 1999). As reported in the press, "operators of plants across the country are watching the Calvert Cliffs case" *Id.*, p. A8.

Additionally, this case directly bears upon significant public safety issues. The ability of potential intervenors, whether they are public interest groups, state and municipal governments or local residents, to meaningfully participate in nuclear safety proceedings, directly affects their ability to protect the environment and the safety of their local communities. It is well-established under the prior NRC rules governing citizen intervention that public intervenors have successfully "flagged significant safety issues regarding nuclear plants that were overlooked by both the NRC and plant owners." *Id.*, p. A8.

The damage the precedent in the case below will cause to the public's ability to participate in these important public health and safety cases is clear. It is simply impossible for the public to meaningfully participate in complex nuclear safety proceedings without the protections mandated by the APA's adjudicatory provisions to allow intervenors the flexibility to

use experts, whose expertise is a must in these complex cases. Because of the extreme importance of nuclear safety, and the need to clarify the standard governing the public's right to participate in nuclear safety proceedings, as set forth *infra*, this case presents an important question that this Court should now review.

I. This Court should grant *certiorari* to resolve conflicts and ambiguities in the decisions of the United States Courts of Appeal and the NRC.

Given the overwhelming public interest in ensuring that nuclear safety adjudications are conducted in strict conformance with Congress' intent, the conflicting rulings of the NRC and courts of appeal should be reviewed and clarified. As set forth below, these troubling ambiguities and conflicting decisions underscore the extremely important nature of this case and exemplify why this Court should grant the Whistleblowers' petition and review this matter.

This case presents the unique circumstance in which differing interpretations of a statute have actually resulted in the administrative agency with the exclusive responsibility over nuclear safety to adopt two diametrically opposed positions on the issue of whether the APA applies to NRC licensing hearings. Compare the Commission ruling in this proceeding, App. 60a, n. 4, with historical presentation outlined by NRC General Counsel, App. 156a-157a. This conflict is perhaps worse than the classic split within the judicial circuits. This split in NRC authority, combined with the complex legislative history of the Atomic Energy Act demonstrates the difficult nature of the question presented in this petition and highlights why this Court should grant *certiorari*.

Likewise, the decisions of the Courts of Appeal have not helped to clarify this issue. At one extreme, the Seventh

Circuit has ruled that adjudications under the Atomic Energy Act are not necessarily bound by the requirements of the APA. In *City of West Chicago v. N.R.C.*, 701 F.2d 632 (7th Cir. 1983), the court found that § 181 of the Atomic Energy Act, which mandates that the provisions of the APA are applicable to all agency actions, does not necessarily mean that the APA applies to NRC adjudications. In a curious twist of logic, the court disregarded the express language of § 181, which reaches "all agency actions," and focused upon the language of § 181 which failed to include the "magic words" "on the record" when describing adjudications, thus failing to "trigger Section 554 of the APA." 701 F.2d at 642. However, as set forth in the NRC General Counsel's memorandum, this ruling clearly does not constitute controlling authority regarding the applicability of the APA in licensing proceedings such as presented in this case. App. 174a.

Even more maddening, the D.C. Circuit has itself, in a series of opinions, equivocated on the question of whether the APA applies to adjudications under the Atomic Energy Act. Because the D.C. Circuit so prominently hears NRC cases, its equivocation lends uncertainty to critical proceedings with nationwide impact.

For example, in *Siegel v. Atomic Energy Commission*, 400 F.2d 778, 785 (D.C. Cir. 1968), the Court of Appeals suggested that the APA is applicable to all actions taken by the Atomic Energy Commission under the Atomic Energy Act. In fact, the court pointed out that the NRC's position supported this conclusion: "the Commission has, however, invariably distinguished between [adjudicatory and rule-making procedures] and has provided formal hearings on licensing cases..." *Id.* While *Siegel* has never been expressly overruled, it is clearly not the current law practiced in the circuit, nor that practiced by the NRC itself, which leads the public to question just what the law is.

Furthermore, in *Union of Concerned Scientists v. N.R.C.*, 735 F.2d 1437, 1444 (D.C. Cir. 1984)(*Union of Concerned Scientists I*), the D.C. Circuit stated that an agency may not "lightly sidestep procedures that involve the public in deciding important questions of public policy."[3/] In addition, in that opinion's footnote 12, the court detailed the relevant authorities and stated that "there is much to suggest" that the APA applies to NRC licensing hearings. *Id.*

This statement by the Court of Appeals could lead a reasonable person to believe that where, as here, an agency disregards the public's interest in nuclear safety for the sake of expediency, the agency decision will be overturned. As such, one would expect the D.C. Circuit to take a harder look at cases such as this where that is precisely what occurred.

In this case, however, just the opposite took place. Instead of evaluating whether the APA's rules of adjudication placed any limit whatsoever on the discretion of the Commission to implement case-specific orders in the Calvert Cliffs proceeding, the court below ignored the APA and the prior rulings of the D.C. Circuit which strongly indicated that the APA was applicable. The court cited favorably to *City of West Chicago, Illinois v. N.R.C.*, 701 F.2d 632, (7th Cir.1983), which is the only Court of Appeals decision that has held that

---

[3/] The D.C. Circuit's concern echoes that of Senator Anderson, one of the key sponsors of the Atomic Energy Act: "...because I feel so strongly that nuclear energy is probably the most important thing we are dealing with in our industrial life today, I wish to be sure the Commission has to do its business out of doors, so to speak, where everybody can see it...I think a hearing should be required and a formal record should be made regarding all aspects, including the public aspects." App. 150a-151a.

the APA adjudicatory rules do not apply in licensing proceedings.

The lack of analysis in justifying the swerve from strongly indicating that the APA adjudicatory rules were applicable to adopting a position affirming a Commission decision finding those rules inapplicable is extremely troubling. The Court (and Commission) failed to distinguish any of the authorities which support a finding of APA applicability, including those set forth in *Union of Concerned Scientists I* and the detailed legal analysis of NRC General Counsel. 735 F.2d 1437, 1444, n. 12.

Here, the NRC established an unreasonably expedited process, because it anticipated new license renewal requests.[4/] The D.C. Circuit did not apply the principle from *Union of Concerned Scientists I* and scrutinize the NRC's actions to ensure that Whistleblowers' rights weren't "lightly sidestepped," for if it had it should have discovered that, on balance, there was simply nothing to suggest urgency on the part of the applicant, while Whistleblowers spent quite literally the entire proceeding fighting for more time to have their experts do a proper job of review.[5/]

[4/] The former NRC General Counsel repudiated much of this rationale: "Since a licensee who timely files a renewal application has the right to operate at least until any necessary hearing has concluded...little practical advantage would be gained by not holding a public hearing." App. 144a.

[5/] For example, as a matter of law, the filing of the request by the utility for a license renewal automatically stayed the expiration of its then-current operating license. *See* 5 U.S.C. § 558(c)(2), App. 129a. So, no matter how long any adjudication might have taken, there was nothing to suggest

(continued...)

In addition, in *Union of Concerned Scientists v. N.R.C.*, 920 F.2d 50 (D.C. Cir. 1990)(*Union of Concerned Scientists II*), the D.C. Circuit stated that it is an "open question" whether § 189(a), which mandates only that a "hearing be held" and is silent on whether the hearing must be "on the record," nonetheless requires the NRC to employ APA procedures for adjudications concerning licensing hearings.

The end result of the D.C. Circuit's erratic pronouncements and the decision of the Seventh Circuit is that the NRC is no longer accountable for the procedures it employs in licensing adjudications. As in this case, the Commission boldly rejected the traditional rules which had tempered its discretion and protected the public's statutory right to meaningfully participate in nuclear safety proceedings. Worse, the Commission issued its own declaration of independence from any constraints imposed by the APA, imposed unprecedented restrictions on the intervenor's ability to utilize expert testimony, and overtly refused to follow past precedent and codified regulations in a manner inconsistent with established administrative case law.

[5/](...continued)
that it would interfere with the utility's ability to operate its facility. Moreover, the operating license for the two reactors in question did not expire until 2014 and 2016, respectively, meaning that the application was filed sixteen to eighteen years in advance. For the NRC to rush the renewal process without demonstrating any cooperative spirit whatsoever to ensure that the Whistleblowers had a fair opportunity to be heard and to participate flies directly in the face of the maxim set forth in *Union of Concerned Scientists I*. The most revealing point is that, because the law is not clear, the NRC felt free to behave as it did, without clear decisional law to guide its behavior or bring it back into line.

Today it is the public's right to participate in adjudicatory proceedings which has fallen victim to the unbridled discretion of an agency. Tomorrow, if there were a change in political climate, it very well may be the utilities expressing abhorrence to the lack of fairness and consistency in the process. Regardless of who is being harmed, the integrity of nuclear safety proceedings nationwide has been undermined by the NRC's declaration of administrative independence and the contradictory responses of the courts of appeal.

Finally, the fact that the NRC's current position on the applicability of the APA fundamentally contradicts the intent of the United States Congress is thoroughly demonstrated, not by partisan advocates with a hidden agenda, but by the NRC's own General Counsel, who in 1989 conducted a comprehensive n in-house review of the issue. On January 13 of that year, the NRC General Counsel issued a thorough legal analysis in memorandum form in which it concluded that "the legislative history...strongly indicates that Congress intended the hearings afforded by Section 189(a) in power reactor licensing cases to be 'on the record...'" App. 174a. After evaluating the Atomic Energy Act's legislative history, and the history of the Joint Committee of Congress on Atomic Energy, the General Counsel concluded that "Congress understood that formal hearings were required, at minimum, in contested power reactor licensing hearings under Section 189." App.166a. Both the legislative history and this Court's case law support the General Counsel's conclusion.

This evaluation of the detailed history of the Joint Committee of Congress on Atomic Energy is extremely significant in understanding the scope of the Atomic Energy Act. For example, in *Power Reactor Development Co. v. International Union*, 367 U.S. 396, 81 S.Ct. 1529 (1961), this Court gave "particular weight" to the "construction" of the law

given by the Joint Committee of Congress on Atomic Energy which, at the time, had a "special duty" to review matters related to the conduct of the Atomic Energy Commission. *See, e.g.* 367 U.S. at 408, 81 S.Ct. at 1535.[6] Significantly, the General Counsel identified a report of the Joint Committee, which held that "without question, in contested cases," formal hearings were required. App. 166a.

The General Counsel also quoted, at length, comments by Senator Anderson, one of the principal sponsors of the Atomic Energy Act. Senator Anderson clearly set forth the "rationale for requiring" nuclear licensing hearing to be conducted in accordance with the APA. App. 153a. According to the Senator:

> "...when the investigation and the possible resulting action are of such far-reaching importance to so many interests that sound and wise government is thought to require that proceedings be conducted publicly and formally so that information on which action is to be based may be tested, answered if necessary, and recorded...where the differences between private interests or between private interests and public officials have not been capable of

---

[6] The Court's approach in *Power Reactor Development Corp.* is consistent with the Court's long history of giving particular respect to "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion," as were the Joint Committee with relation to the nascent Atomic Energy Act. *See, e.g. Norwegian Nitrogen Products Co. v. United States*, 288 U.S 294, 315, 53 S.Ct. 350, 358 (1933).

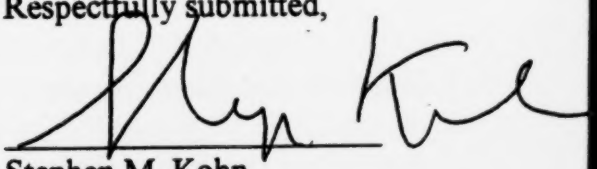
> solution by informal methods but have proved sufficiently irreconcilable to require settlement through formal public proceedings in which the parties have an opportunity to present their own and attack the others' evidence and arguments before an official body with authority to decide the controversy." App. 153a.

Thus, the Atomic Energy Act's framers clearly understood that hearings under the Act should be on the record. Accordingly, *certiorari* is clearly warranted to resolve the conflicting or ambiguous rulings of the NRC and courts of appeal on this and the other issues presented in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the Whistleblowers' Petition for *Certiorari* in order to finally resolve whether the APA applies to adjudications brought under the Atomic Energy Act.

Respectfully submitted,



Stephen M. Kohn
Counsel of Record
Michael D. Kohn
David K. Colapinto
National Whistleblower Legal
Defense & Education Fund
3233 P Street, N.W.
Washington, D.C. 20007
(202) 342-1903
(202) 342-6984 (Fax

September 13, 2000

APPENDIX

APPENDIX INDEX

National Whistleblower Center v. Nuclear Regulatory Commission,
208 F.3d 256 (D.C. Cir. 2000) 1a

National Whistleblower Center v. Nuclear Regulatory Commission,
196 F.3d 1271(D.C. Cir. 1999) 20a

National Whistleblower Center v. Nuclear Regulatory Commission,
No. 99-1002, slip op., Nov. 12, 1999 (unpublished),
vacated 196 F.3d 1271 ..... 24a

In re Baltimore Gas and Electric Company,
48 N.R.C. 325 (December 23, 1998) 47a

In re Baltimore Gas & Electric Company,
LBP-98-26, Memorandum and Order denying
Intervention Petition (October 16, 1998) 77a

In re Baltimore Gas & Electric Company,
48 N.R.C. 134 (September 17, 1998) 94a

In re Baltimore Gas & Electric Company,
ASLBP No. 98-749-01-LR (August 27, 1998)
(unpublished) 98a

In re Baltimore Gas & Electric Company,
48 N.R.C. 45 (August 26, 1998) 103a

In re Baltimore Gas & Electric Company,
48 N.R.C. 39 (August 19, 1998) 114a

National Whistleblower Center v. Nuclear Regulatory Commission,
No. 99-1002, June 15, 2000, Order denying petition for rehearing 123a

42 U.S.C. § 2239(a)(1)(A) 124a

5 U.S.C. § 554 ..... 126a

5 U.S.C. § 558 ..... 129a

10 C.F.R. Part 2 § 2.711 ..... 131a

10 C.F.R. Part 2 § 2.714(a)-(c) 132a

William C. Parler, General Counsel Memorandum, "OGC Analyses of Legal Issues Relating to Nuclear Power Plant Life Extension," January 13, 1989. ..... 136a

United States Court of Appeals,
District of Columbia Circuit.

NATIONAL WHISTLEBLOWER CENTER, Petitioner,
v.
NUCLEAR REGULATORY COMMISSION and United States of America, Respondents.
Baltimore Gas and Electric Company, Intervenor.

Nos. 99-1002, 99-1043.

Argued March 2, 2000 Decided April 11, 2000
Rehearing and Rehearing En Banc Denied June 15, 2000.

On Petitions for Review of an Order of the Nuclear Regulatory Commission.

Peter B. Bloch argued the cause for petitioner. With him on the briefs were *Stephen M. Kohn*, *Michael D. Kohn* and *David K. Colapinto*.

John F. Cordes, Jr., Solicitor, United States Nuclear Regulatory Commission, argued the cause for respondents. With him on the briefs were *Lois J. Schiffer*, Assistant Attorney General, United States Department of Justice, *Mark Haag*, Attorney, *Karen D. Cyr*, General Counsel, United States Nuclear Regulatory Commission, *E. Leo Slaggie*, Deputy Solicitor, and *Marjorie S. Nordlinger*, Senior Attorney.

David R. Lewis, argued the cause for intervenor Baltimore Gas and Electric Company. With him on the briefs was *James B. Hamlin*.

Before: EDWARDS, *Chief Judge*, WILLIAMS and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* HARRY T. EDWARDS.

HARRY T. EDWARDS, *Chief Judge*: The petition for review in this case presents a claim by the National Whistleblower Center ("Center") seeking to overturn a decision by the Nuclear Regulatory Commission ("NRC" or "Commission") denying intervention by the Center in a nuclear power plant license renewal proceeding. The relicensing at issue involves the Calvert Cliffs nuclear facilities operated by Baltimore Gas & Electric ("BG&E"). This is the second time that this matter has come before this court. On November 12, 1999, the court issued a judgment holding that the NRC erred in rejecting the Center's petition to intervene in the Calvert Cliffs license renewal proceeding. *See National Whistleblower Center v. NRC*, No. 99-1002, Slip. Op., 1999 WL 1024662 (D.C.Cir. Nov. 12, 1999). Following a sua sponte inquiry by the court, however, this judgment was vacated, *see National Whistleblower Center v. NRC*, 196 F.3d 1271 (D.C.Cir.1999), and the case was reargued before the court on March 2, 2000. Upon reconsideration, we deny the Center's petition for review.

Any third party seeking to participate in a relicensing proceeding must file a motion to intervene, followed by a timely submission of "contentions." A contention is a specific issue of law or fact that the third party seeks to have adjudicated; it must be substantiated by an explanation of its bases, a statement of supporting facts or expert opinion, appropriate references and citations, and sufficient information to indicate that a genuine dispute exists between the party seeking to intervene and the applicant. The Center's problems in this case arose when it failed to make a timely filing of contentions in support of its petition to intervene in the Calvert

Cliffs relicensing proceeding.

The Center complains that the NRC erred in applying an overly rigid standard in assessing their requests for extensions of time. According to the Center, the Commission was required to adhere to a well-established "good cause" test in considering petitions for extensions of time. The NRC replies, in turn, that it gave clear notice in a published policy statement and in a subsequent referral order in the Calvert Cliffs proceeding that the agency intended to adopt a streamlined schedule in license renewal proceedings. The referral order specifically directed that "the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances." In re Baltimore Gas & Elec. Co., Order Referring Petition for Intervention and Request for Hearing to Atomic Safety and Licensing Board Panel, CLI-98-14,6 (Aug. 19, 1998), reprinted in Joint Appendix ("J.A.") 23, 28.

We hold, first, that the NRC was free to adopt, without resort to notice-and- comment rulemaking, the "unavoidable and extreme circumstances" standard for application in the Calvert Cliffs proceeding, so long as affected parties had proper notice of the standard and it was not arbitrary and capricious, or otherwise in violation of the law. There is no doubt here that the agency's policy statement and subsequent referral order at the start of the Calvert Cliffs proceeding gave the Center and other interested parties adequate notice. Furthermore, the agency's adoption of the "unavoidable and extreme circumstances" standard did not reflect any arbitrary and capricious, or otherwise unlawful action. The revised standard was not an extreme departure from the "good cause" standard and it was adequately explained by the Commission; and the agency was not bound by any law to adhere to the old "good cause" standard.

Furthermore, on the record at hand, the Center can show no cognizable injury. The disputed "unavoidable and extreme circumstances" test was undoubtedly applied once, when the Licensing Board denied the Center's request for an extension of time to file contentions. However, that action was reversed by the NRC when it granted the Center's petition for more time. The Center thereafter failed to meet the extended deadline. The Center claims that it filed a subsequent motion for an extension upon missing the extended deadline, but the record belies this claim. And, even assuming, arguendo, that the October 1, 1998 filings to which the Center refers can be viewed as a request for an additional extension of time, it is clear that those filings do not indicate even good cause for the purported request. In other words, the Center was not denied any extension of time that might otherwise have been obtained if the Commission had applied the "good cause" standard. Thus, the Center suffered no prejudice from the agency's application of the disputed "unavoidable and extreme circumstances" test.

The record in this case indicates that the contested motion to intervene was properly denied by the Commission, because the Center failed to submit the required contentions within the prescribed deadline. Accordingly, the petition for review is hereby denied.

I. BACKGROUND

The Calvert Cliffs relicensing process officially commenced on April 8, 1998, when BG&E applied to renew its licenses to operate the nuclear power plant. A few weeks later, the application was made public and the Commission announced that interested third parties would have an opportunity to request a hearing. *See* Notice of Receipt of

Application, 63 Fed.Reg. 20,663 (1998). On May 19, 1998, the Commission accepted BG&E's application for docketing, again noted that the application was publicly available, and again announced that third parties would be afforded an opportunity to request a hearing. *See* Notice of Acceptance for Docketing of the Application, 63 Fed.Reg. 27,601 (1998). On July 8, 1998, the NRC published a notice outlining the rights of third parties to seek a hearing in the Calvert Cliffs proceeding. *See* Notice of Opportunity for a Hearing, 63 Fed.Reg. 36,966 (1998). The July 8 Notice indicated that anyone seeking a hearing would be required to file a request and an application to intervene by August 7, 1998. The Notice also indicated that such parties would be required to file "a supplement to the petition to intervene which must include a list of contentions which are sought to be litigated in the matter." Id. at 36,966.

The Calvert Cliffs case is the first of many nuclear power plant license renewal proceedings. In view of the anticipated large number of license renewal applications, and also in response to "recent experience and criticism of agency proceedings," the Commission announced its intention to streamline procedures for adjudicatory actions before the agency. Policy on Conduct of Adjudicatory Proceedings, 63 Fed.Reg. 41,872, 41,873 (1998). The NRC recognized that "the opportunity for hearing should be a meaningful one"; the Commission, however, noted that "applicants for a license are also entitled to a prompt resolution of disputes concerning their applications." Id. Accordingly, in this policy statement, the Commission "identified certain specific approaches for its boards to consider implementing in individual proceedings, if appropriate, to reduce the time for completing licensing and other proceedings." Id. In particular, the Commission stated that requests for extensions of time should only be granted

"when warranted by unavoidable and extreme circumstances." Id. at 41,874.

A few days after issuance of the policy statement, the Center filed a petition to intervene in the Calvert Cliffs proceeding. The Commission referred the motion to intervene to an Atomic Safety and Licensing Board ("Board") for further action. *See In re Baltimore Gas & Elec. Co.*, Order Referring Petition for Intervention and Request for Hearing to Atomic Safety and Licensing Board Panel, CLI-98-14 (Aug. 19, 1998), reprinted in J.A. 23. The NRC's Referral order contained a number of directives to the Board, including limitations on the scope of the proceeding and a suggested schedule for completing the proceeding. Drawing from its policy statement, the Commission instructed the Board not to grant "requests for extensions of time absent unavoidable and extreme circumstances." Id. at 6, reprinted in J.A. 28.

On August 20, 1998, the Licensing Board issued an Initial Prehearing Order. *See In re Baltimore Gas & Elec. Co.*, ASLBP No. 98-749-01-LR, Memorandum and Order, Initial Prehearing Order (Aug. 20, 1998), reprinted in J.A. 42. The order contained deadlines for submissions as well as other procedural directives. Specifically, the order directed the Center to file its required contentions by September 11, 1998, and noted that a prehearing conference would be held during the week of October 13. The order also stated that any requests for extensions of time were to be submitted three business days before the due date for the pleading and emphasized that such requests must "demonstrate 'unavoidable and extreme circumstances.' " Id. at 10, reprinted in J.A. 51.

The day after the Board issued its Prehearing Order, the Center filed two motions, one directed to the Commission

requesting that it vacate the referral order, and another directed to the Board requesting that it extend the time for contentions and delay the prehearing conference until at least December 1, 1998. In the Motion to Vacate, the Center objected to the NRC's directive that extensions of time be granted only in "unavoidable and extreme circumstances." The Center argued that "[i]t is illegal and improper for the [Commission] not to follow the 'good cause' standard" set forth in 10 C.F.R. § 2.711(a). Petition's [sic] Motion to Vacate Order CLI-98-14, 7 (Aug. 21, 1998). In denying the motion to vacate, the NRC stated that the agency had "plenary supervisory authority over its adjudications and adjudicatory boards," which "allows it to interpret and customize its process for individual cases." In re Baltimore Gas & Elec. Co., Memorandum and Order, CLI 98-15, 6- 7 (Aug. 26, 1998), reprinted in J.A. 55, 60-61. The Commission also noted that the unavoidable and extreme circumstances standard "simply gives content ... to [the] rule's general 'good cause' standard." Id. at 6-7 n. 5, reprinted in J.A. 60-61 n.5. For these and other reasons, the Commission denied the Center's Motion to Vacate.

The Board, in turn, denied the Center's Motion for Enlargement of Time. The Board held that the Center had failed to demonstrate the requisite "unavoidable and extreme circumstances" required to justify an extension of time. *See In re Baltimore Gas & Elec. Co.*, ASLBP No. 98-749-01-LR, Memorandum and Order, Denying Time Extension Motion and Scheduling Prehearing Conference, 3 (Aug. 27, 1998), reprinted in J.A. 65, 67. Accordingly, the Center's deadline for submitting contentions remained September 11, 1998. The Center, however, filed no contentions on September 11. Instead, it filed a Petition for Review with the Commission appealing the Board's denial of its request for an extension. The Center argued that the Board was wrong to deny it an

extension of time, and that the deadline for contentions was itself improper. Under the current schedule, the Center argued, it "should have had ... until September 30, 1998 to make the required filings." Petition for Review, 6-7 (Sept. 11, 1998).

The Commission acquiesced. While it stood by the Board's application of the "unavoidable and extreme circumstances" test, the Commission nonetheless granted the Center until September 30, 1998, to file its contentions. *See In re Baltimore Gas & Elec. Co.*, Memorandum and Order, CLI-98-19 (Sept. 17, 1998), reprinted in J.A. 71. The next day, the Center filed a motion asking the Board to delay the prehearing conference, or, in the alternative, provide for a one-day extension to accommodate a Jewish holiday. *See* Petitioner's Motion to Vacate Pre-Hearing Conference or in Alternative for an Extension of Time (Sept. 18, 1998). The Board denied the request to delay the prehearing conference, but granted the one-day extension, making the Center's contentions due October 1, 1998. *See In re Baltimore Gas & Elec. Co.*, ASLBP No. 98-749-01-LR, Memorandum and Order, Scheduling Matters and Electronic Hearing Database (Sept. 21, 1998), reprinted in J.A. 74.

The Center missed the extended October 1, 1998 deadline. No contentions were filed on that date. Rather, the Center filed a "Status Report," a "Motion to Vacate and Re-Schedule the Pre-Hearing Conference," and a "Motion Requesting to be Informed of Communication Between the NRC Staff and Applicant." The Center also filed an answer to questions raised about its standing. The Status Report listed the experts hired by the Center and the areas of concern that they would cover. In the Motion to Vacate, the Center noted that the Commission's staff had submitted "Requests for Additional

Information" ("RAIs") to BG&E and that BG&E was not required to submit its responses to the RAIs until November 21, 1998. The Center argued that it would be prejudicial and unfair to the Center to require it to submit its contentions before BG&E had submitted its responses to the RAIs. Thus, the Center argued, "the pre- hearing conference should be postponed until no sooner than 115 days after [BG&E] submits its response to the RAI." Petitioner's Motion to Vacate and Re-Schedule the Pre-Hearing Conference, 6 (Oct. 1, 1998). The Motion Requesting to be Informed of Communication Between the NRC Staff and Applicant asked that the Center be included on the agency's service list for written communications and given notification of status conferences regarding the BG&E application.

It was not until October 13, 1998, when the Center finally filed two purported contentions. Subsequently, on October 16, 1998, the Board dismissed the Center's petition to intervene. The Board held that the Center had "failed to establish cause" for an extension, failed to file any contentions before the prescribed deadline, and failed to show that the contentions filed on October 13 met the late-filed contention standards. In re Baltimore Gas & Elec. Co., ASLBP No. 98-749-01-LR, Memorandum and Order, Denying Intervention Petition/Hearing Request and Dismissing Proceeding, 19-20 (Oct. 16, 1998), reprinted in J.A. 315, 333-34. The Center then sought review by the NRC.

The Commission upheld the Board's dismissal, rejecting the Center's argument that it was denied extensions of time to which it was entitled under the "good cause" standard. Although the NRC defended the "unavoidable and extreme circumstances" test, it found no need to apply it. Rather, the Commission held that the Center's "complete failure to provide

specific information about its concerns precluded any finding that 'good cause,' in a meaningful sense, justified [the Center's] requested extensions of time prior to [October 1st]." In re Baltimore Gas & Elec. Co., Memorandum and Order, CLI-98-25, 10-11 (Dec. 23, 1998), reprinted in J.A. 336, 345-46. The Commission also upheld the Board's decision to reject contentions filed by the Center on October 13, both because the Center failed to meet the late-filed contention standards, and also because the purported contentions were wholly inadequate. This appeal followed.

II. ANALYSIS

The Center has voiced many objections in protesting the NRC's actions in this case. Almost all of the objections are plainly meritless. One objection, however, warrants our attention. That one objection rests on the Center's claim that the NRC erred in adopting and applying an "unavoidable and extreme circumstances" test, in lieu of a "good cause" test, to assess requests for extensions of time in which to file contentions in the Calvert Cliffs nuclear power plant license renewal proceeding. We reject this claim, because the Commission was fully justified in adopting the disputed test and, also, because the Center suffered no prejudice in the Commission's application of the new standard.

A. NRC's Authority to Change an Adjudicatory Rule

[1] The Center contends that the Commission erred in applying the "unavoidable and extreme circumstances" test to its requests for extensions of time. The correct standard, argues the Center, is the "good cause" test articulated in the Commission's regulations. The Commission argues that the "unavoidable and extreme circumstances" test simply gives

content to "good cause." Moreover, the NRC adds, the adoption of the new standard resulted in no breach of law, because the "Commission implemented it with a case-specific adjudicatory order." Supp. Br. for Respondents at 9. The Commission has the better of this argument. We are in complete accord with the Seventh Circuit's position that the NRC possesses the authority "to change its procedures on a case-by-case basis with timely notice to the parties involved." *City of West Chicago v. NRC*, 701 F.2d 632, 647 (7th Cir.1983) (*citing NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974)). There is no claim here that the Center lacked timely notice of the new "unavoidable and extreme circumstances" standard. The Commission announced its intention to adopt the standard in a policy statement published on August 5, 1998. Although the policy statement, alone, was not binding, it nonetheless informed the Center and other interested parties of the impending change. *See Panhandle Eastern Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C.Cir.1999) ("Th[e] advance-notice function of policy statements yields significant informational benefits, because policy statements give the public a chance to contemplate an agency's views before those views are applied to particular factual circumstances."). More importantly, the Center received express notice that the new standard would be applied in the Calvert Cliffs proceeding when the Commission adopted the standard in its referral order to the Licensing Board. Indeed, the Center responded to this notice when it objected to the referral order, and to the "unavoidable and extreme circumstances" test specifically, in its August 21, 1998 Motion to Vacate. *See* Petition's [sic] Motion to Vacate Order CLI-98-14, 7 (Aug. 21, 1998).

In short, the Center's argument that the Commission lacked authority to change an adjudicatory rule is simply wrong.

B. The "Unavoidable and Extreme Circumstances" Standard is a "Procedural" Rule that Was Properly Adopted Without Notice-and-Comment Rulemaking

[2] We also hold that the disputed "unavoidable and extreme circumstances" standard embodies a procedural rule. Rules that "prescribe [ ] a timetable for asserting substantive rights" are procedural. *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C.Cir.1983). And unless such rules "foreclose effective opportunity to make one's case on the merits," they need not be promulgated pursuant to notice-and-comment rulemaking. Id.

[3] The disputed agency action in this case merely altered a standard for the enforcement of filing deadlines; it did not purport to regulate or limit the Center's substantive rights. In other words, the new rule was procedural, not substantive. *See JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 327-28 (D.C.Cir.1994) (holding that a rule governing the content and timing of case filings is "procedural," even when it arguably "encodes the substantive value judgment that applications containing minor errors should be sacrificed to promote efficient application processing"). As the court noted in JEM, "agency housekeeping rules often embody a judgment about what mechanics and processes are most efficient." Id. at 328. This does not convert a procedural rule into a substantive one.

The NRC has expressed a clear and reasonable goal of expediting nuclear power plant license renewal proceedings, both to accommodate the large number of cases to be heard and to ensure fair processes for applicants and would-be intervenors alike. The adoption of the "unavoidable and extreme circumstances" standard did not foreclose participation

by third parties seeking to intervene in the Calvert Cliffs proceeding; rather, to facilitate expedited case processing, the new rule merely required parties who failed to meet otherwise reasonable deadlines to demonstrate compelling reasons before they could obtain any extensions of time beyond prescribed deadlines.

The Center argues that, under Lamoille Valley, the NRC could not adopt the "unavoidable and extreme circumstances" standard except through notice-and- comment rulemaking, because the new rule, in conjunction with the other rules on intervention, "create[d] a regime which renders it impossible for the public to set forth substantive contentions." Petitioner's Supp. Br. at 10-11 (citing Lamoille Valley, 711 F.2d at 328). This is a specious claim. The Commission's determination to expedite license renewal proceedings resulted in tight schedules. However, would-be intervenors were not denied an effective opportunity to be heard. BG&E's application was publicly available for five months prior to the time when the Center was required to submit contentions. Even using the Center's preferred starting date, i.e., July 8, 1998 (when the NRC published a notice outlining the rights of third parties to seek a hearing in the Calvert Cliffs proceeding), the Center still had 85 days to prepare its contentions. This was a sufficient amount of time, especially considering that the default period for submitting contentions is only 75 days. *See* Rules of Practice, 43 Fed.Reg. 17,798, 17,799 (1978) (establishing that a pre- hearing conference is normally set 90 days after the initial hearing notice and noting that contentions are normally to be submitted 15 days prior to the prehearing conference, thus allowing 75 days between the initial hearing notice and the default deadline for contentions).

Thus, given that the prescribed deadline for filing

contentions did not itself foreclose effective opportunity to be heard, a fortiori, the Commission's decision to tighten the standard for granting extensions of time did not, as the Center claims, "create a regime which render[ed] it impossible for the public to set forth substantive contentions."

C. NRC's Adoption of a New Procedural Standard Easily Survives "Arbitrary and Capricious" Review

[4] The only remaining question at issue is whether the NRC's adoption of the new procedural standard in the Calvert Cliffs proceeding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). It was not. A change to procedures in an adjudicatory order is not arbitrary or capricious when it merely refines an existing procedural standard and when no affected party has detrimentally relied on the old standard. *See, e.g., Bell Aerospace*, 416 U.S. at 294-95, 94 S.Ct. 1757; *Ruangswang v. INS*, 591 F.2d 39, 44-45 (9th Cir.1978).

NRC's adoption of a new procedural standard did not significantly or unreasonably change the regime pursuant to which requests for extensions of time are judged, because the "unavoidable and extreme circumstances" standard is not off the moorings of "good cause." *See City of Orrville v. FERC*, 147 F.3d 979, 988 n. 11 (D.C.Cir.1998) (noting that the Commission was within its discretion to use adjudication to refine its regulation's "good cause" standard to require a showing of "extraordinary circumstances"); *In re Bjella*, 806 F.2d 211, 216 (10th Cir.1986) (en banc) ("There is no significant distinction between a showing of good cause and a showing of unusual or extreme circumstances.").

Moreover, the Center has shown no detrimental reliance in

this case. The Center was bound to follow prescribed deadlines for the submission of required contentions. They had no basis upon which to assume that those deadlines automatically would be waived upon request pursuant to the old good cause standard. Indeed, the Center has offered nothing to indicate that, in preparing their contentions, they acted to their detriment on the assumption that their requests for extension of time would be favorably considered pursuant to the old good cause test. Quite frankly, such an argument would be silly.

[5] In short, the Commission did not abuse its discretion in adopting the "unavoidable and extreme circumstances" test in the Calvert Cliffs adjudicatory proceeding. The Center makes a weak argument that the Commission's new procedural rule was arbitrary and capricious, because the agency offered no adequate explanation for the changed policy. *See* Petitioner's Supp. Reply Br. at 3. We disagree. As previously noted, the Commission's policy statement that immediately preceded the adoption of the adjudicatory order in the Calvert Cliffs proceeding fully explained the need for expedited case processing. 63 Fed.Reg. at 41,873-74. Given the wide latitude an agency has in designing its own proceedings, *see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524-25, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), the NRC's decision to expedite case processing in license renewal proceedings to accommodate an impending heavy docket was well within the realm of the agency's discretion. The policy statement, which was expressly cited in the Commission's referral order to the Licensing Board, adequately supported the Commission's adoption of the "unavoidable and extreme circumstances" test. The agency action easily survives arbitrary and capricious review.

D. The Center Has Shown No Prejudicial Error

[6] In the end analysis, this case appears to be much ado about nothing. The Center has complained strenuously about the NRC's adoption of a new standard under which the agency will assess requests for extensions of time in which a petitioner must file contentions. But the Center has offered absolutely nothing to show how the promulgation of the new rule, even if, arguendo, in error, resulted in prejudice or other cognizable harm to them. *See* 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."); *see* also *Fried v. Hinson*, 78 F.3d 688, 690-91 (D.C.Cir.1996) (dismissing petitioner's claim for lack of a showing that he had been prejudiced by the agency's adoption of modified procedures). We can find no prejudicial error in this case.

The Center's first request for an extension of time was filed with the Licensing Board on August 21, 1998. *See* Petitioner's Motion for Enlargement of Time (Aug. 21, 1998). The Board denied the request, applying the "unavoidable and extreme circumstances" test. The Center petitioned the Commission for review, claiming that, under the current schedule, it was entitled until September 30, 1998 "to make the required filings." *See* Petition for Review, 6-7 (Sept. 11, 1998). The Commission overturned the Board's decision, granted the petition for review, and allowed the Center an extension of time until September 30, 1998 in which to file contentions. Subsequently, the Center requested "a one day extension of the September 30, 1998 filing date" to accommodate a Jewish holiday observed by Petitioner's attorneys. Petitioner's Motion to Vacate Pre-Hearing Conference or in Alternative for an Extension of Time, 2 (Sept. 18, 1999). This request was also granted. *See* In re Baltimore Gas & Elec. Co., ASLBP No. 98-749-01-LR, Memorandum and Order, Scheduling Matters

and Electronic Hearing Database (Sept. 21, 1998), reprinted in J.A. 74. The Center missed the extended deadline, failing once again to file contentions within the prescribed time limit.

On October 1, rather than file the required contentions, the Center filed four different documents, none of which was labeled as a request for an extension. The Center argues that its October 1 "Motion to Vacate and Re-Schedule the Pre-Hearing Conference" should be construed as a request for an extension. Even if the so-called Motion to Vacate could be viewed as a request for a further extension of time in which to submit contentions, the Center's position would still fail. The principal problem here is that the motion was not a supported request for an extended deadline. Rather, it presented an argument that the Center should not be required to submit contentions before BG&E had submitted responses to staff RAIs. At oral argument, counsel for the Center candidly conceded that, as propounded in the Motion to Vacate, "the RAI's were our peg." *See* Tr. of Oral Argument March 3, 2000 at 49. This "peg," however, provided absolutely no support for a request for a further extension of time. It is clear that, under prevailing law, the Center had no right to the RAIs. *See Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55-56 (D.C.Cir.1990). In fact, at oral argument, counsel conceded that the Center "did not have a right to discovery of the RAIs." *See* Tr. of Oral Argument March 3, 2000 at 49. This being the case, it can hardly be claimed that the Center could condition the filing of contentions on receipt of RAIs and answers thereto.

[7] At oral argument, counsel for the Center cited the Commission's Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process, 54 Fed.Reg. 33,168 (Aug. 11, 1989), in an effort to bolster the

claim that the Center had a right to view RAI material before submitting contentions. Under the cited provision, "an intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the [nuclear power] facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention." Id. at 33,170. In other words, a potential intervenor must review the NRC Public Document Room for any materials that might be relevant to formulating contentions. *See* Tr. of Oral Argument March 3, 2000 at 49-50. According to the Center, in order to satisfy this rule, a potential intervenor must have access to the RAIs (which are kept in the Public Document Room) before it can be required to file contentions. The Public Document Room argument comes much too late. The argument was never presented to the Commission and it was not raised in any of the many briefs that have been submitted to the court in this case. The claim is, in a word, untimely. *See United Transp. Union v. Surface Transp. Bd.*, 114 F.3d 1242, 1244 (D.C.Cir.1997); *Cronin v. FAA*, 73 F.3d 1126, 1134 (D.C.Cir.1996).

Even if we were to view the Public Document Room argument as one that naturally flows from the Center's other claims on RAIs, and thus properly within the compass of the petition for review before this court, we would nevertheless reject the argument as patently specious. The cited regulation merely says that an intervention petitioner is obliged "to examine the publicly available documentary material." Obviously, if a document has not been filed in the Public Document Room, or if it is filed too late to be considered by an intervention petitioner, then the petitioner cannot be held responsible for reviewing it. Nothing in the rule suggests otherwise. Therefore, we must surmise that the Center's

belated Public Document Room argument is nothing more than an attempt to avoid the clear policy that denies would-be intervenors any entitlement to RAIs as a condition precedent to filing contentions.

There can be no doubt that, on the record before us, the Center suffered no prejudicial error when the Commission adopted the new "unavoidable and extreme circumstances" standard in the Calvert Cliffs proceeding. The Center sought and received from the NRC two extensions of time in which to file contentions. When they failed to meet the extended deadlines, their motion to intervene was properly denied.

III. CONCLUSION

For the reasons given above, the petition for review is denied.

United States Court of Appeals,
District of Columbia Circuit.

NATIONAL WHISTLEBLOWER CENTER, Petitioner,
v.
NUCLEAR REGULATORY COMMISSION and United States of America, Respondents.
Baltimore Gas and Electric Company, Intervenor.

Nos. 99-1002, 99-1043.

Nov. 22, 1999.

Before: EDWARDS, *Chief Judge*, and WILLIAMS, *Circuit Judge*.

A concurring statement of *Chief Judge* HARRY T. EDWARDS is attached.

ORDER

PER CURIAM:

It is ORDERED, by the Court, on its own motion, that the majority opinion and the judgment filed herein on November 12, 1999, be, and the same hereby are, vacated.

A future order will schedule further briefing and rehearing after a member of the Court is randomly selected to replace former *Circuit Judge* WALD as the third member of the panel.

HARRY T. EDWARDS, *Chief Judge*, concurring:

I concur in the Order vacating the opinion and judgment

issued on November 12, 1999, because, in retrospect, I fear that the original (now vacated) majority opinion fails to address some critical issues in this case. These issues were not the focus of the arguments during the first hearing before the court, so it is unsurprising that they were lost in our haste to issue an opinion before our colleague, Judge Wald, departed from the court. However, in my view, the issues are too important to ignore once uncovered; thus, I feel that this case must be reheard.

The now vacated majority opinion is founded on the view that petitioners were prejudiced by the Commission's abrogation of a substantive rule. After considering this matter further, I find that there is good reason to believe that we were mistaken in assuming that the Commission acted pursuant to a substantive, as opposed to a procedural, rule.

On August 5, 1998, the Commission published a statement of Policy on Conduct of Adjudicatory Proceedings ("Policy") in which it stated that licensing boards should grant extensions of time "only when warranted by unavoidable and extreme circumstances." 63 Fed.Reg. 41,872, 41,874 (Aug. 5, 1998). The Commission subsequently invoked this new rule in an order referring a petition filed by the National Whistleblower Center ("Center") to the Atomic Safety and Licensing Board, stating that extensions of time should only be granted if the petitioner can demonstrate "unavoidable and extreme circumstances." Order Referring Petition for Intervention and Request for Hearing to Atomic Safety and Licensing Board Panel, CLI 98-14, reprinted in Joint Appendix ("J.A.") 23, 28 (Aug. 19, 1998).

There can be no doubt that the Commission's August 5, 1998, Policy adopted a new standard to govern requests for

extensions of time in proceedings of the sort here at issue. It also seems clear that the new standard was intended to modify the standards previously enunciated in 10 C.F.R. § 2.711(a) and § 2.714(b)(1). And it is undisputed that the Center had notice of the new standard for granting extensions of time. The Center additionally understood the thrust of the Policy, for they objected to the new standard on the ground that it was contrary to the "good cause" standard contained in 10 C.F.R. § 2.711(a). *See* Memorandum and Order, CLI 98-15 (Aug. 26, 1998) reprinted in J.A. 60 (characterizing the Center's objections to the new standard as articulated in the Commission's Aug. 19, 1998 referral order).

Given that the Commission adopted a new standard to be applied in cases of this sort and that the Center had notice of the new standard before the advent of the procedures here in dispute, it matters a great deal whether the standard is viewed as a new "substantive" or "procedural" rule. If, as appears to be the case, the new standard is a procedural rule, then it is exempt from the requirements of notice and comment under the Administrative Procedure Act, 5 U.S.C. § 553(b)(A). *See JEM Broad. Co. v. FEC*, 22 F.3d 320 (D.C.Cir.1994).

It is no answer to say that the Commission was wrong to construe "good cause" as "unavoidable and extreme circumstances." If this is a procedural rule, and if it does not transcend the bounds of due process or violate some clear statutory mandate, then the Commission is entitled to define "good cause" as it sees fit. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). Given that latitude, it would be an oxymoron to say that "unavoidable and extreme circumstances" is outside the realm of acceptable understandings of "good cause."

These issues were not properly aired during the first round of briefs and arguments before this court. We would be remiss, I think, to issue the mandate in this case without considering the questions that are now apparent. I do not believe that the Commission has waived the right to argue the procedural/substantive issue, because the agency could not have reasonably anticipated the position reached in the first majority opinion. In short, the case must be reheard, with a proper focus on the issues at hand.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 6, 1999 Decided November 12, 1999

No. 99-1002
Consolidated with No. 99-1043

NATIONAL WHISTLEBLOWER CENTER,
PETITIONER

v.

NUCLEAR REGULATORY COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS
BALTIMORE GAS AND ELECTRIC COMPANY,
INTERVENOR

On Petition for Review of an Order of the Nuclear Regulatory Commission

Stephen M. Kohn argued the cause for petitioner. With him on the briefs was *David K. Colapinto*.
Marjorie S. Nordlinger, Attorney, United States Nuclear Regulatory Commission, argued the cause for respondent. With her on the brief were *Karen D. Cyr*, General Counsel, *John F. Cordes, Jr.*, Solicitor, *E. Leo Slaggie*, Deputy Solicitor, *Lois J. Schiffer*, Assistant Attorney General, United States Department of Justice, and *Mark Haag*, Attorney.
David R. Lewis and *James B. Hamlin* were on the brief for intervenor.

Before: EDWARDS, *Chief Judge*, WALD and WILLIAMS,

Circuit Judges.

Opinion for the Court filed by *Circuit Judge* WALD.
Dissenting opinion filed by *Circuit Judge* WILLIAMS.[1]

WALD, *Circuit Judge*: This appeal involves the dismissal by the Nuclear Regulatory Commission ("NRC" or "the Commission") of a petition by the National Whistleblower Center, a citizens' group ("Whistleblower"), to intervene in the first ever license renewal proceeding for a nuclear power plant, in this instance Calvert Cliffs. The NRC issued a referral order to an Atomic Safety Licensing Board ("Board") which prescribed a streamlined procedure for the proceeding, including a shortened time period for Whistleblower to file its contentions. In the referral order, NRC for the first time also adopted a stringent interpretation of the "good cause" standard in its published rules for extending prescribed time limits, to henceforth require a showing of "unavoidable and extreme circumstances." *See* NRC Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, 10 C.F.R. § 2.711 (1999). When Whistleblower asked the Board for an extension of time to file its contentions, the Board denied its request, applying the "unavoidable and extreme circumstances" standard, and the NRC affirmed the decision. The NRC subsequently dismissed Whistleblower's petition when Whistleblower failed to file contentions within the NRC's deadline.

Because we conclude that the "unavoidable and extreme circumstances" test is effectively an amendment of the Commission's regulations made without notice and comment required by the Administrative Procedure Act, we vacate the

---

[1] Judge Williams' dissent will be filed at a later date.

Commission's decision dismissing the petition to intervene and remand to the agency to consider Whistleblower's motion for an extension of time under its prior interpretation of the "good cause" standard. Recognizing that much progress has been made in processing the Calvert Cliffs renewal application since a year ago when the contested events occurred, we require only that the Commission provide Whistleblower with a meaningful opportunity to submit its contentions. If Whistleblower can show "good cause"--under the Board's prior interpretation--for its original request for an extension of time to file contentions and the contentions satisfy the agency's other published criteria, the agency must allow Whistleblower to participate meaningfully in the license renewal process.

I. Background

On July 8, 1998, the NRC published a Notice of Opportunity for a Hearing in the Federal Register permitting any interested person to intervene in the proceeding regarding the license renewal application of the Baltimore Gas & Electric Company ("BG&E") to continue to operate the Calvert Cliffs Nuclear Power Plant. The Notice of Receipt of the application was published in late April but the application was not accepted for docketing until May 19. Whistleblower filed a petition to intervene on August 7. The July 8 hearing notice contained what the Commission later referred to as "ambiguous" language paraphrasing sections 2.714(a)(3) and 2.714(b)(1) of its published regulations to the effect that any petitioner to intervene could amend a petition or supplement contentions[2] not later than fifteen days before the first

[2]A contention is a specific issue of law or fact which a petitioner seeks to have litigated at a hearing. Under NRC rules, a contention must include a specific statement of the issue of law or fact to be argued and the

prehearing conference. *See Baltimore Gas & Elec. Co.*, Calvert Cliffs Nuclear Power Plant, Units 1 & 2; Notice of Opportunity for a Hearing Regarding Renewal of Facility Operating License, 63 Fed. Reg. 36,966, 36,966 (1998); 10 C.F.R.§ 2.714(a)(3), (b)(1). On August 19, however, the NRC referred the petition to intervene to an Atomic Safety and Licensing Board and gave "guidance" to the Board on how to conduct the proceeding. Among other things, the referral order directed the Board to adopt a streamlined schedule for the hearing. Significantly, the order directed that "the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances." Joint Appendix ("J.A.") at 28. Two days later, Whistleblower filed with the Commission a motion to vacate the referral order as contrary to the Commission's regulations prescribing extensions of time for "good cause" and allowing contentions to be filed fifteen days before an initial prehearing conference. *See* 10 C.F.R. §§ 2.711(a), 2.714(a)(3), (b)(1). The Commission denied the motion on the ground that it has authority to shorten the time for filing contentions under section 2.711, and that limiting extensions to "unavoidable and extreme circumstances" merely gives content to the general "good cause" standard.

On August 20, the Board issued an initial prehearing order requiring Whistleblower to file its contentions by September 11, 1998, and scheduled the first prehearing conference for the

---

petitioner must support it with a brief explanation of its bases; a short statement of the facts or expert opinion which are intended to support it, together with references to the specific documents and sources upon which the petitioner will rely to establish the facts or opinion; and sufficient information to show that a genuine dispute exists between the intervenor and the applicant on a material issue. *See* Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, 10 C.F.R.§ s 2.714(b)(2) (1999).

week of October 13, later specifying October 15. In short, Whistleblower was required to file its contentions within three weeks after the prehearing order and thirty-four days before the prehearing conference. In addition, the Board reiterated that any motion for an extension of time must "demonstrate 'unavoidable and extreme circumstances' that support permitting the extension."

The day after the Board's initial prehearing order, Whistleblower filed a motion to extend the time for filing contentions until mid-November. Whistleblower based the motion on its need to retain experts to review the application and to provide necessary technical input, the complexity of the three-volume relicensing application and the fact that this proceeding would inevitably involve novel issues since it was the first nuclear power reactor license renewal proceeding ever. A week later, on August 27, the Board rejected petitioner's motion for an extension of time, stating that Whistleblower failed to meet its burden of establishing "unavoidable and extreme circumstances" justifying an extension. Whistleblower petitioned the Commission for interlocutory review of the decision and on September 17 the Commission issued an order moving the deadline for contentions to September 30--subsequently extended to October 1 because of a Jewish Holiday. The Commission explained its action by saying that Whistleblower might not have anticipated such an early date for filing contentions since the language in the July 8 notice stated that under section 2.714(b)(1), petitioners could file contentions not later than fifteen days prior to the first prehearing conference. However, the Commission expressed general satisfaction with the Board's streamlined agenda for the relicensing procedure, concluding that the Board acted reasonably in setting an earlier date for filing contentions than its published rules provided and in refusing to extend the time

for filing, and reaffirmed the "unavoidable and extreme circumstances" test. In light of the Commission's action, the Board subsequently rescheduled the initial prehearing conference for November 12. This meant that Whistleblower had to file its contentions forty-two days before the prehearing conference, instead of fifteen days as set out in the Commission's rules.

On October 1, the due date for filing its contentions under the Commission's reprieve, Whistleblower filed a status report and a motion to vacate and reschedule the prehearing conference. The status report identified the experts that Whistleblower had retained, the "areas of concern" in the application the experts were studying, and recited various alleged defects and omissions in BG&E's license renewal application. In the status report and the motion to vacate, Whistleblower included numerous references to its argument that it had "good cause" for an extension of time. In addition, Whistleblower asserted in its motion to vacate that the Board and Commission improperly and prejudicially applied the stringent "unavoidable and extreme circumstances" test in rejecting its motion for enlargement of time. However, Whistleblower specifically stated that the status report was not to be regarded as its contentions. On October 13, Whistleblower filed its "first supplemental set of contentions." Whistleblower indicated that it retained the right to supplement its petition to intervene as provided in the Commission's published rules and that it was filing the contentions without prejudice to its October 1 motion to vacate and reschedule the prehearing conference. The filing contained two contentions, one alleging that the renewal application was incomplete and must be withdrawn or summarily dismissed and another alleging that the application failed to meet aging and other safety-related requirements. However, Whistleblower did not

allege specific facts to support these contentions, but rather referred to the Requests for Additional Information filed by the NRC staff ("RAIs")[3] as setting forth the bases for each contention. On October 16, the Board concluded that Whistleblower had neither submitted contentions by the October 1 deadline nor demonstrated that the October 13 contentions met the late-filing standards of 10 C.F.R. § 2.714(a);[4] accordingly it dismissed Whistleblower's petition to intervene.

The Commission on December 23, 1998 affirmed both the Board's decision to reject the motion for an extension of time and to dismiss the petition. The Commission said that the Board had "good cause" to shorten the normal time provided in the written regulations for filing contentions because a shorter deadline would make the prehearing conference more meaningful by allowing the Board and Whistleblower to consider the NRC staff's answer to the proposed contentions

---

[3] A Request for Additional Information is a demand by the NRC staff for important information not present in a license application. During a review of any application by the staff, an applicant may be required to supply such additional information. *See* 10 C.F.R. § 2.102(a). An application may be denied if an applicant fails to respond to a request for additional information within 30 days from the request or any other time specified. *See id.* s 2.108.

[4] Even if contentions are filed after a deadline for filing, they can nonetheless be admitted as late-filed contentions. Late-filed contentions are admitted if the presiding officer makes a finding that the contentions satisfy a balancing of factors: good cause for failure to file on time; availability of other means to protect the petitioner's interest; whether a petitioner's presence will help develop a sound record; whether petitioner's interest will be adequately represented by existing parties; and the extent to which a petitioner's participation will broaden the issues or delay the proceeding. *See* 10 C.F.R. § 2.714(a)(1), (b)(1).

prior to the scheduled date of the conference. The Commission once again approved the Board's use of the "unavoidable and extreme circumstances" test to reject Whistleblower's motion for an extension of time. It reasoned that the test was a "construction of 'good cause' " intended as a "reasonable means of avoiding undue delay in this important license renewal proceeding, and for assuring that the proceeding is adjudicated promptly." J.A. at 345-46.

II. Analysis

The nub of this controversy is whether NRC's new interpretation of a published regulation amounts to an amendment of the regulation requiring notice and comment under the Administrative Procedure Act. *See* 5 U.S.C. s 551(5) (1994). Whistleblower argues that the Commission departed from its own published rules when it rejected Whistleblower's motion for an extension of time to file contentions as failing the "extreme and unavoidable circumstances" standard instead of continuing to use the "good cause "standard applied in all previous requests for extensions. The Commission responds that the "unavoidable and extreme circumstances" test is merely an interpretation of the good cause standard, and an agency is entitled to deference in construing its own regulation. We conclude, however, that the Commission's new interpretation of "good cause" so fundamentally modifies that standard, as previously interpreted by the agency, that it constitutes an amendment, requiring notice and comment.

A. The Incompatibility of the "Good Cause" and "Unavoidable and Extreme Circumstances" Standards

The NRC's published regulations provide that "not later than fifteen days prior to the holding ... of the first prehearing

conference, the petitioner shall file a supplement to his or her petition to intervene that must include a list of contentions which petitioner seeks to have litigated in the hearing." NRC Rules of Practice and Procedure for Domestic Licensing Proceedings and Issuance of Orders, 10 C.F.R. § 2.714(b)(1) (1999). However, a different provision of the same Rules provides: "whenever an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may for good cause be extended or shortened by the Commission or the presiding officer." Id. s 2.711(a) (emphasis added).[5] When Whistleblower filed a motion for an extension of time, the Board followed the directives of the Commission's referral order and applied the "unavoidable and extreme circumstances" test in rejecting the motion. Whistleblower alleges that the "unavoidable and extreme circumstances" test amounts to an amendment of section 2.711 and is therefore invalid because it was not adopted through notice and comment.

A basic tenet of administrative law is that an agency's interpretation of its own regulations is given " 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). However, an equally well-established administrative law principle provides that an agency may not adopt an interpretation of its own regulation which either contradicts the plain meaning of the regulation, *See Ohio Power Co. v. FERC*, 954 F.2d 779, 783 (D.C. Cir. 1992)

---

[5] Moreover, 10 C.F.R. § 2.714(b)(1) provides that "additional time for filing" a supplement to contentions may be granted based on the same balance of factors for admitting late-filed contentions. 10 C.F.R. § 2.714(a)(1), (b)(1).

("[N]o deference is owed an interpretation at odds with the plain meaning of the text."); *Guard v. NRC*, 753 F.2d 1144, 1148-49 (D.C. Cir. 1985) (noting that "high regard" of deference to NRC interpretation of its own regulation "is appropriate only so long as the agency's interpretation does no violence to the plain meaning of the provision at issue"); *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 381 (D.C. Cir. 1983) ("[W]hen an agency's interpretation of its own rules flies in the face of the language of the rules themselves, it is owed no deference."), or fundamentally changes the agency's own prior interpretation of the regulation. *See Hudson v. FAA*, -- F.3d --, --, No. 98-1295, 1999 WL 798067, at[6] (D.C. Cir. Oct. 8, 1999) (noting that " '[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.' ") (quoting *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997)); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (striking down new agency interpretation that was contrary to advice given for 30 years by its Alaska office and informal agency statements as an effective amendment of FAA regulations); *National Family Planning and Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 239-40 (D.C. Cir. 1992) (striking down a Department of Health and Human Services interpretation of its own regulation to allow Title X physicians to counsel abortion as a method of family planning contrary to earlier interpretation by agency barring all Title X personnel from discussing the possibility of abortion).

---

[6]Moreover, 10 C.F.R. § 2.714(b)(1) provides that "additional time for filing" a supplement to contentions may be granted based on the same balance of factors for admitting late-filed contentions. 10 C.F.R. § 2.714(a)(1), (b)(1).

The reason behind this ban on radical reinterpretation of published regulations is that "to allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment would undermine those APA requirements." Paralyzed Veterans, 117 F.3d at 586; *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (concluding that notice and comment rulemaking would be required if an agency were to effect "a substantive change" in its regulations by adopting a new position inconsistent with its existing regulations). This principle applies whether the agency adopts the fundamental change in interpretation in a purported policy statement, interpretative rule or adjudication. *See, e.g., Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 92 (D.C. Cir. 1997) (reinterpretation advanced in FDA publication labeled a notice and referred to in its text as a policy statement); *Paralyzed Veterans*, 117 F.3d at 588 (interpretative rule); *Caraballo v. F ch*, 11 F.3d 186, 195 (D.C. Cir. 1993) (Department of Labor "interpretative" statement expounded in the course of an adjudication).

While "good cause" appears at first blush an exceedingly flexible term (some might say a near-empty vessel, waiting to be filled), there are limits to its meaning and to the concept it represents. The Supreme Court itself recognized this recently. *See Jones v. United States*, -- U.S. --, --, 119 S. Ct. 2090, 2098 (1999) (holding that phrase "good cause" in 18 U.S.C. s 3593(b)(2)(C), which provides for impaneling a new jury in a sentencing hearing if the trial jury has been discharged for good cause, "cannot be read so expansively as to include the jury's failure to reach a unanimous decision").

Furthermore, this court has held that even though a word in an agency rule may not have a precise meaning, an agency's interpretation of the word is invalid if it is far removed from the recognized meaning of the term. *See C.F. Communications*

Corp. v. FCC, 128 F.3d 735, 739 (D.C. Cir. 1997) (concluding that while the word "premises" does not have a single fixed meaning, that "does not convert the word into a sort of Rorschach test, permitting the Commission to read into the word anything it pleases" and rejecting as plainly erroneous agency interpretation divorced from term's established definition). Section 2.711 does not itself define "good cause," but the history of the regulation makes clear that its purpose was to give the Commission flexibility to alter the time limits in its proceedings when that course would not unfairly prejudice the parties. In 1962, when the agency amended the precursor to section 2.711, it explained that it was "designed to expedite proceedings without sacrificing the fair and impartial consideration of the issues." Revision of Rules, 27 Fed. Reg. 377, 377 (1962). In 1972, the Commission codified section 2.711 in its present form and included a specific finding that section 2.711 allowed modifications of time limits "in appropriate cases, where it would not prejudice a party." Restructuring of Facility License Application Review and Hearing Processes, 37 Fed. Reg. 15,127, 15,129 (1972). Clearly, a balance of the Commission's administrative convenience and fair opportunities for parties to participate meaningfully in its proceedings was intended.

And indeed, the NRC has in the past consistently interpreted good cause for extending or shortening time to file contentions as the presence of a "good reason" why either the parties or the Commission desire changing normal time schedules. *See, e.g.*, In re Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), 18 N.R.C. 1400, 1401 (1983) ("Section 2.711 permits the Board to reduce time limits where there is a good reason to do so."); United States Dep't of Energy Project Management Corp. Tenn. Valley Auth. (Clinch River Breeder Reactor Plant), 17 N.R.C. 158, 162

(1983) (construing 10 C.F.R. § 2.714(a)'s requirement of "good cause" for failure to file on time as "good reason"); In re Virginia Elec. & Power Co. (N. Anna Power Station, Units 1 & 2), 4 N.R.C. 98, 101 (1976) (same); In re Duquesne Light Co. (Beaver Valley Power Station, Unit 2), 7 A.E.C. 959, 968 (1974) (same). Neither party here disputes that the new "unavoidable and extreme circumstances" test for "good cause" requires a significantly stronger showing than a "good reason" for an extension of time to file a contention. There can be little doubt that the "unavoidable and extreme circumstances" test inevitably reflects a significant change from the Commission's prior interpretation of the "good cause" standard; as such, it falls under the doctrine that when an agency has given a regulation an authoritative interpretation, and later significantly changes that interpretation, it has effectuated an amendment of that rule which will be invalid unless it gives notice and comment. *See Alaska Prof'l Hunters*, 177 F.3d at 1034; *Paralyzed Veterans*, 117 F.3d at 586; *see also Syncor*, 127 F.3d at 94-95 (noting that a modification of an interpretation of an agency rule "will likely require a notice and comment procedure").

The Commission's rejection of Whistleblower's asserted justifications for an extension of time--the need for its experts to study the voluminous application to formulate contentions and the novelty and complexity of issues raised by the application in the context of the first license renewal proceeding for a nuclear power plant--is also inconsistent with prior NRC cases in which the Commission has granted extensions of time based on the complexity of the issues involved or the need to give experts time to review an application, or both. *See In re Private Fuel Storage*, L.L.C. (Indep. Spent Fuel Storage Installation), No. 72-22-ISFSI, 1997 WL 687737, at *3 (N.R.C. Oct. 7, 1997) (granting

extension of time for filing contentions based on need of party to provide its experts with additional time to review application and the length and complexity of the application); In re Northern Ind. Pub. Serv. Co. (Bailey Generating Station, Nuclear 1), 12 N.R.C. 191, 217 (1980) (finding good cause to treat as timely contentions filed after deadline due to the short time for preparation set by Prehearing Conference Order as well as the complexity of the newly-filed contentions); In re Commonwealth Edison Co. (Zion Station, Units 1 & 2), 6 A.E.C. 827, 827 (1973) (finding good cause under section 2.711 for an extension of time for filing exceptions and supporting briefs for appeal of decision due to the length of the initial decision and the number and complexity of the issues involved). Indeed, our court has held that an agency has an obligation in an adjudication to follow, distinguish, or overrule its own precedent and we have not hesitated to strike down agency action when it fails to meet this obligation. *See Steger v. Defense Investigative Serv. Dep't of Defense*, 717 F.2d 1402, 1406 (D.C. Cir. 1983) (reversing Merit Systems Protection Board decision to deny attorney's fees which disregarded without explanation factors used in prior Board decisions for determining if attorney's fees are appropriate); Local 777, *Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 872, 882 (D.C. Cir. 1979) (refusing to enforce NLRB interpretation of "employee" and "independent contractors" in 29 U.S.C. s 152(3) which did not explain inconsistency with most recent NLRB opinion on subject). When Whistleblower offered reasons for an extension of time similar to those which the Commission has approved in the past, the Board rejected them out of hand and the Commission affirmed the Board's decisions, using the "unavoidable and extreme circumstances" test without explaining or distinguishing its own prior precedent approving such reasons as qualifying for "good cause". At no time did the Commission ever address its own

prior interpretation of "good cause" in circumstances like this one when a party asks for more time to have its experts review material in a complex case. Moreover, the Commission in this case seems to have effectuated a result entirely different from its prior cases where it found that reasons for delay similar to those encountered by Whistleblower constituted "good cause" for an extension of time.

This court has long held that an agency may not use its interpretative powers to " 'constructively rewrite [a] regulation' or 'effect a totally different result.' " *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992) (quoting *National Family Planning and Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992)). This case is not dissimilar to both Alaska Professional Hunters and Syncor. In Alaska Professional Hunters, we invalidated a Federal Aviation Administration ("FAA") interpretation of its own rules to treat hunting guides who flew clients to and from hunting sites as commercial operators contrary to the prior interpretation of those rules given as advice to guides by the FAA's Alaska Region office for more than thirty years and informal statements by the agency that guides were noncommercial operators. *See* 177 F.3d at 1035-36. Similarly, in Syncor we held invalid 1995 Food and Drug Administration ("FDA") guidelines which interpreted the registration provisions of the Federal Food Drug and Cosmetic Act ("FFDCA") to apply to positron emission tomography ("PET") radiopharmaceuticals because they differed from 1984 FDA guidelines which stated that nuclear pharmacists using the process by which pharmacies compound PET radiopharmaceuticals were not required to register under the FFDCA. *See* 127 F.3d at 95-96. Like the FAA in Alaska Professional Hunters and the FDA in Syncor, the NRC in this case has adopted an interpretation that effects a totally different result for a motion for an extension of

time premised upon the need to give experts time to review an application and to address novel and complex issues from that which would have occurred under the prior "good cause" standard.

Another indicator that the Commission was significantly changing the usual meaning of "good cause" when it adopted the "unavoidable and extreme circumstances" test is that it did not apply the same test to determine if its own reduction of the normal time allotted to intervenors to file contentions was valid. Curiously, the Commission made no mention of the "unavoidable and extreme circumstances" standard when it shortened intervenor deadlines "for good cause" in order to expedite proceedings. The Commission concluded that it had "good cause" to do so because the alteration of the time frame would permit both the Board and Whistleblower to consider the NRC staff's answer to the proposed contentions prior to the scheduled date of the prehearing conference whereas under the NRC's published rules the staff's answer would not be due until the day of the conference. Surely such a reason does not qualify as an "unavoidable and extreme circumstance" and the Commission never said it did. In the absence of any explanation of the differing ways in which it interpreted the same phrase depending on whose interests were at stake, it appears that the Commission was amending the test for the intervenors only, even though the rule itself makes no such distinction.

Additionally, we note that the Commission has commonly employed standards similar to "unavoidable and extreme circumstances" elsewhere in its rules, yet has never suggested that they are the same as "good cause." For example, the Commission has interpreted "special circumstances" in its rule allowing a complete waiver of a rule where "the application of

the rule ... would not serve the purposes for which the rule or regulation was adopted," 10 C.F.R. § 2.758, to mean that a waiver will only be granted in "unusual and compelling circumstances." Public Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), 30 N.R.C. 231, 235 (1989); Public Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), 29 N.R.C. 234, 239 (1989); In re Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), 5 A.E.C. 25, 26 (1972). The Commission has also interpreted its rule allowing interlocutory review of an order only if it "[t]hreatens ... immediate and serious irreparable impact which ... could not be alleviated through a petition for review of the ... final decision," or "affects the basic structure of the proceeding in a pervasive or unusual manner," 10 C.F.R. § 2.786(g), as allowing such review only "in the most compelling circumstances." In re Sequoyah Fuels Corp. (Gore, Okla. Site), 40 N.R.C. 55, 59 (1994) (citing In re Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), 8 N.R.C. 406, 410 (1978)). However, we are not aware of a single prior instance in which the NRC has described or interpreted "good cause" as requiring "unusual," "extreme," "unavoidable" or "compelling" circumstances.

There may be good reason for this omission. "Good cause" does not ordinarily convey a meaning of "unavoidable and extreme circumstances." Virtually every dictionary published around the time that section 2.711 was amended to its present form defined "good cause" as a legally sufficient cause that is reasonable under the circumstances. *See*, e.g., Webster's Third New International Dictionary 978 (1976) ("cause or reason sufficient in law: one that is based on equity or justice or that would motivate a reasonable man under all the circumstances"); Black's Law Dictionary 623 (5th ed. 1979) ("substantial reason, one that affords a legal excuse. Legally

sufficient ground or reason ... cause as would compel a reasonably prudent person ... under similar circumstances ... that cause that to an ordinary intelligent man is a justifiable reason for doing or not doing a certain thing"); Ballentine's Law Dictionary 527 (3d ed. 1969) ("substantial reason, a legal excuse ... legal cause ... reasonable cause").

In contrast, "unavoidable and extreme" has a quite different meaning. Although some definitions of "unavoidable cause" might conceivably fit within the meaning of "good cause," *See*, e.g., Black's Law Dictionary 1366 ("a cause which reasonably prudent and careful men under like circumstances do not and would not ordinarily anticipate"); Ballentine's Law Dictionary 1311 ("a cause which reasonably prudent and cautious men under like circumstances do not and would not ordinarily anticipate"), we think the additional requirement that the circumstances be "extreme" as well as "unavoidable" takes it into a different realm of outlier causes rather than reasonable causes. *See*, e.g., 5 Oxford English Dictionary 618-19 (2d ed. 1989) ("Outermost, farthest from the centre ... opposed to moderate ... Of a case, circumstance, supposition: Presenting in the utmost degree some particular characteristic ... the utmost point or verge ... an end ... the utmost imaginable or tolerable degree of anything"); Black's Law Dictionary 528 ("[a]t the utmost point, edge or border; most remote. Last; conclusive. Greatest, highest, strongest, or the like."); Webster's Third New International Dictionary 807 ("existing in the highest or the greatest possible degree; ... most severe; most stringent ... going beyond the limits of reason, necessity or propriety ... situated at the farthest possible point from the center"); Ballentine's Law Dictionary 447 ("Outermost; utmost"). These dictionary definitions make the difference between the two standards apparent: whereas "good cause" would allow an extension of time in situations not due to

negligence that would ordinarily cause delay, the "unavoidable and extreme circumstances" standard would allow extensions only in the most extraordinary situations. The transfer from the reasonable to the most unusual results in a significant reduction of a litigant's ability to obtain an extension of time to file contentions.

While we conclude that "unavoidable and extreme circumstances" is a fundamental modification of the Commission's "good reason" definition of "good cause" requiring notice and comment, we acknowledge that the term "good cause" itself initially affords the agency a great deal of flexibility and discretion to decide its content under individual circumstances.[1] Given the expertise and experience of the NRC with licensing, it is most favorably situated to make such a determination through the reasonable balancing of agency and intervenor interests that is inherent in the term "good cause"; and its judgment will in the vast majority of cases be upheld. It can for instance require a greater showing of need for an extension of time in cases where the Commission's need to expedite proceedings significantly outweighs a party's need for

---

[1]The meaning of "good cause" may also be substantially influenced by congressional intent in providing for a "good cause" exception. *See*, e.g., *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (holding that the APA "good cause" exception to notice and comment requirement of agency rulemaking was intended by Congress "to be narrowly construed" and limited to "emergency situations"); *Environmental Defense Fund v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) (same); *American Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (deriving "emergency situations" test from Senate Report). But cf. *Bjella v. McPeters*, 806 F.2d 211, 216 (10th Cir. 1986) (holding that "good cause" exception to sanction for late-filed transcripts in Judicial Conference Report was not incompatible with individual court plan allowing exception only in "unusual or extreme circumstances").

more time. However, this flexibility does not include authority to constructively amend a "good cause" standard by adopting an interpretation that departs radically from its own precedent, without notice and comment, and which it applies only to third parties, not to itself.

B. Prejudice to the Petitioner to Intervene

Only if there is prejudice to a challenging party can agency action be invalidated under the APA. *See* 5 U.S.C. s 706 ("[D]ue account should be taken for the rule of prejudicial error."); *see also Fried v. Hinson*, 78 F.3d 688, 690-91 (D.C. Cir. 1996) (*citing American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)). The Commission argues that even if it applied the wrong standard to Whistleblower's motion for an extension of time, Whistleblower was not harmed by this error because the contentions it ultimately submitted were patently deficient under NRC regulations governing the specificity of contentions. *See* 10 C.F.R. § 2.714(b)(2). The contentions Whistleblower submitted did not set forth any specific grounds for its allegations and merely referred to NRC staff RAIs for their bases. The NRC has consistently held that mere references to RAIs are insufficient to meet the specificity requirements under 10 C.F.R. § 2.714. *See* Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (1989) (noting that the Commission rejects the argument that "petitioners not be required to set forth facts in support of contentions until the petitioner has access to NRC reports and documents"); In re Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), 36 N.R.C. 135, 136 (1992) (holding that the attempt to incorporate by reference the questions asked by the staff concerning environmental report fails to comply with the Commission's pleading requirements).

Even though Whistleblower ultimately submitted contentions on October 13 that were deficient under the Commission's specificity requirements, we think it was nonetheless prejudiced by the Commission's use of the "unavoidable and extreme circumstances" test to deny its requests for extensions at two earlier points in the proceeding. First, the extension which Whistleblower originally requested in August would have moved the time for filing contentions back two months. The Commission's decision to grant Whistleblower an extension to September 30th did little to remove any prejudice from the Board's denial of its earlier request because by the time it was granted, Whistleblower had only two weeks left in which to file. Additionally, it reinforced the Board's use of the "unavoidable and extreme circumstances" test. We cannot know whether Whistleblower's original request for a two month extension would have been granted in full under the good cause standard. At the very least, it is strongly possible that Whistleblower would have received the extension because it had asserted factors which had been approved by the Commission in the past as sufficient to justify good cause for an extension. *See*, e.g., In re Northern Ind. Pub. Serv. Co. (Bailey Generating Station, Nuclear 1), 12 N.R.C. 191, 217 (1980) (finding good cause to treat as timely contentions filed after deadline due to the short time set for filing contentions in the Order Setting the Prehearing Conference and the complexity of the newly-filed contentions).

As the Status Report and Motion to Vacate and Reschedule the Initial Prehearing Conference filed by Whistleblower on October 1 demonstrate, Whistleblower continued to assert throughout the aborted proceeding that the "unavoidable and extreme circumstances" test was improper, thereby adequately preserving the issue that it never had time to prepare adequate contentions. Moreover, although the October 13 contentions

were inadequate, Whistleblower clearly indicated on the face of the contentions that it desired to preserve its objection that it needed more time (the contentions were filed "without prejudice to Petitioner's October 1, 1998 Motion to Vacate"). J.A. at 225 n.1. Formally, Whistleblower labeled its October 13 set of contentions a "first supplemental set of contentions," specifically asserting its right to file contentions up until fifteen days before the prehearing conference as set out in 10 C.F.R. § 2.714(b)(1). Therefore, Whistleblower preserved its argument that the Commission improperly used the "unavoidable and extreme circumstances" test to deny its motion for an extension of time even as it filed contentions on October 13.

Whistleblower was obviously scrambling to come up with the most specific contentions it could within the short time it had to file. Significantly, Whistleblower actually submitted additional information to the Board on October 16, the day the petition to intervene was finally rejected. If the "good cause" standard had been used to adjudicate Whistleblower's motion to extend the time for filing contentions until mid-November, Whistleblower by that time would likely have submitted sufficient information to support an adequate contention. In sum, the strong possibility that Whistleblower would have been granted an extension until mid-November had the "good cause" standard been applied and that it could have by that time submitted adequate contentions is sufficient to show prejudice. *See Presbyterian Med. Ctr. of the Univ. of Penn. Health Sys. v. Shalala*, 170 F.3d 1146, 1151 (D.C. Cir. 1999) (concluding that prejudicial error exists if there is a possibility that the error would have resulted in some change in the final outcome) (*citing Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983)); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 n.27 (D.C. Cir. 1978) (concluding

that prejudicial error exists "[I]f [agency] action is improper, and if we cannot be sure that the Agency would have reached the same conclusion" if it acted properly).

III. Conclusion

For the foregoing reasons, we vacate the order of the Nuclear Regulatory Commission denying the National Whistleblower Center's petition to intervene and dismissing the hearing in connection with Baltimore Gas and Electric Company's license renewal application for the Calvert Cliffs Nuclear Power Plant. We remand to the agency to determine whether Whistleblower had "good cause" for an extension of time to file contentions under the interpretation of "good cause" the Commission had employed prior to the Calvert Cliffs application. If National Whistleblower Center meets that standard and if it subsequently files adequate contentions before a new deadline, the Commission must allow it an opportunity to meaningfully participate in the remainder of the proceeding.

SO ORDERED.

IN THE MATTER OF
BALTIMORE GAS & ELECTRIC COMPANY
(Calvert Cliffs Nuclear Power Plant, Units 1 and 2)

Nuclear Regulatory Commission

CLI-98-25

Docket Nos. 50-317-LR, 50-318-LR

December 23, 1998

Commissioners: Shirley Ann Jackson, Chairman, Nils J. Diaz, Edward McGaffigan, Greta J. Dicus, Jeffrey S. Merrifield

MEMORANDUM AND ORDER

This proceeding involves an April 8, 1998, application by Baltimore Gas & Electric Company ("BG&E") to renew its operating licenses for Units 1 and 2 of its Calvert Cliffs Nuclear Power Plant. The National Whistleblower Center ("NWC" or "petitioner") filed a timely intervention petition opposing the application. On October 16, 1998, the Licensing Board issued LBP-98-26, dismissing the proceeding on the ground that NWC had failed to submit contentions by the October 1, 1998, deadline prescribed by the Board. NWC appeals LBP-98-26 pursuant to 10 C.F.R. § 2.714a[1] For the

[1]NWC not only has challenged LBP-98-26 on appeal to the Commission, but also recently filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit challenging the same Board order. NWC cannot simultaneously challenge the same order before both the Commission and the court of appeals. *See, e.g., Melcher v.*

reasons given by the Board in LBP-98-26, and for the reasons below, we affirm.

PROCEDURAL BACKGROUND

NWC's essential grievance is the Commission's alleged failure to provide sufficient information and time to develop contentions adequate to trigger a hearing under our rules. *See* 10 C.F.R. § 2.714. NWC challenges an array of procedural rulings by the Board and by the Commission itself. We therefore set out in some detail the chronology of the Calvert Cliffs proceeding and the series of orders and decisions leading ultimately to the Board's rejection of NWC's petition to intervene.

This proceeding began on April 27, 1998, when the Commission published in the Federal Register a notice that BG&E's April 8th application was then available for public inspection at the NRC Public Document Room. *See* 63 Fed. Reg. 20,633. On May 19th, the NRC published another notice, this one announcing its staff's determination that the application was sufficiently "complete" to be "acceptable for docketing." *See* 63 Fed. Reg. 27,601. This second notice also indicated that the docketing of the application "does not preclude requesting additional information as the [staff's]

FCC, 134 F.3d 1143, 1163 (D.C. Cir. 1998); *Accura of Bellevue v. Reich*, 90 F.3d 1403, 1407-08 (9th Cir. 1996). Nonetheless, as NWC's appeal to the Commission came first and has not been withdrawn, we proceed to decide it. NWC's premature lawsuit apparently results from a misunderstanding of our rules. Although petitions seeking discretionary Commission review are "deemed denied" if not acted on in thirty days (10 C.F.R. § 2.786(c)), no comparable provision governs appeals as of right, such as NWC's (*see* 10 C.F.R. § 2.714a). In the latter case, the final agency action is a Commission decision disposing of the appeal.

review proceeds, nor does it predict whether the Commission will grant or deny the application." Id. On July 8th , the Commission published a notice of opportunity for hearing, permitting interested persons to file petitions for intervention by August 7th . *See* 63 Fed. Reg. 36,966. The notice specified that petitioners must submit their contentions "not later than fifteen ... days prior to the first prehearing conference." Id. The notice, however, did not preclude the Board from establishing an earlier deadline for contentions.

On July 28th , the Commission issued a Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 63 Fed. Reg. 41,872 (Aug. 5, 1998) ("Policy Statement"), providing guidance for all adjudications. The Policy Statement was not part of the Calvert Cliffs proceeding, but expressed the Commission's general expectation that Licensing Boards would establish schedules for promptly deciding issues and specifically reminded the Boards of their authority under various provisions of 10 C.F.R. Part 2 to shorten filing and response periods to the extent practical in specific proceedings. The Policy Statement also addressed such subjects as establishing milestones in an adjudication, granting extensions of time, and staying discovery against the NRC staff.

On August 7th , NWC filed a petition for intervention and hearing with the Commission in the Calvert Cliffs license renewal proceeding. On August 19th , the Commission issued CLI-98-14, 48 NRC 39, referring NWC's petition to the Atomic Safety and Licensing Board, offering guidance on some of the matters that it had recently addressed in its policy statement, and setting out a suggested expedited procedural schedule for the case, with a goal of resolving the Calvert Cliffs proceeding within thirty months.

On August 20th , the Board issued an unnumbered Memorandum and Order scheduling further filings in this proceeding. In that order, the Board scheduled the prehearing conference for the week of October 13th , established a September 11th deadline for the filing of contentions, and stated that contentions submitted after that date would be considered untimely and would therefore have to satisfy the "late filing" requirements of 10 C.F.R. § 2.714(a)(1)(i)-(v).

NWC responded to these two orders on August 21st by asking the Commission to vacate the scheduling and guidance portions of CLI-98-14 and by asking the Board both to postpone the prehearing conference until December 1st and to grant NWC a postponement of the deadline for contentions until fifteen days prior to the prehearing conference. On August 26th , the Commission issued CLI-98-15, 48 NRC 45, denying NWC's motion to vacate. On August 27th , the Board issued an unnumbered order denying NWC's request for an enlargement of time. In that order, the Board noted that the application was far more limited in scope than an initial license application, that NWC had not shown why -- given that NWC had had access to the application since April -- it would be unable to formulate conten-tions by September 11th , and that NWC had provided no examples of complex or novel issues warranting delay. Id. at 2-3. Instead of submitting contentions by September 11th , as required by the Board's August 20th and 27th orders, NWC again came to the Commission, this time with a petition for review of the Board's refusal to modify its schedule. On September 17th , we issued CLI-98-19 indicating that the Board had "acted entirely reasonably ... in refusing to extend [the deadline for filing contentions] until November" and we further "urge[d] the Board to continue its effort to move this proceeding forward expeditiously." 48

NRC at 134. Notwithstanding these statements and with the intention of giving NWC every reasonable opportunity to participate in this proceeding, we granted NWC an extension of nearly three weeks (until September 30th , one of several dates suggested by NWC) within which to file its contentions.

Subsequent to our issuance of CLI-98-19, the Board denied a motion filed by NWC (on September 18th) for "partial discovery" but granted an alternative motion for a second extension (for one day) within which to file contentions. The Board also set the staff's and BG&E's response deadline at November 2nd and scheduled the prehearing conference for the week of November 9th . *See* Unnumbered Memorandum and Order, dated September 21, 1998, slip op. at 2-3. On September 29th , the Board set the prehearing conference for November 12th .

Despite NWC's two extensions of time, the October 1st deadline passed without NWC submitting contentions to the Board. Instead, it filed four pleadings on that date. In one of these (styled "Status Report"), NWC listed the experts from whom it had obtained commitments of assistance and also the "areas of concern" which those experts had raised as possible contentions or bases for contentions. NWC stated explicitly that, in listing these "areas of concern," it was not thereby filing contentions. In another October 1st filing (entitled "Motion to Vacate and Reschedule Prehearing Conference"), NWC brought to the Board's attention a request by the staff to BG&E for additional technical information ("request for additional information" or "RAI") regarding the license renewal application. NWC complained that the RAI had not been placed in the Public Docket Room until September 22nd , nearly a month after its August 28th issuance, that

neither the staff nor BG&E had informed petitioners or the Board of the existence of the RAI, and that BG&E is not expected to respond to the RAI until November 21st , nine days after the then-scheduled November 12th prehearing conference. NWC went on to assert that, if BG&E needs more than 100 days [sic, actually 85] to "complete [[[its] renewal application" by responding to the August 28th RAI, then NWC should have 115 days within which to respond with contentions prior to the pre-hearing conference (i.e., until March 16, 1999). *See* NWC Motion to Vacate at 6. Finally, in its October 1st "Reply to NRC Staff and BG&E's Answer to NWC's Petition to Intervene and Request for Hearing," NWC set forth two arguments in support of its claim of standing -- arguments that NWC later characterized on appeal as "contentions." Motion at 11.

Later, on October 7th and 16th , NWC provided the Board with copies of thirty-four more staff RAIs, the existence of which purportedly "impacts this proceeding [and] provides a basis for the Board's dismissal of the ... BGE ... license renewal application ... or in the alternative, for the Board's vacating and rescheduling of the pre-hearing conference that is scheduled to take place on November 12, 1998." NWC's Notice of Filing, dated Oct. 16, 1998, at 1. NWC considered the RAIs to be proof that BG&E had failed to file a "complete and acceptable" application.

On October 13th , relying solely upon the existence of staff's RAIs, petitioner filed two contentions: one claimed that BG&E's application was incomplete as a matter of law and must be either withdrawn or dismissed, and the other claimed in general terms that the application fails to meet aging and other safety-related requirements. Thus, as of the October 16th issuance date of LBP-98-26, the Board had

pending before it these two contentions and NWC's request to reschedule the prehearing conference. The Board in LBP-98-26 determined that NWC had failed to submit any contentions by the Board's October 1st deadline or to show that the October 13th contentions had met the Commission's standards for late-filed contentions. Based on these conclusions, the Board denied NWC's petition to intervene and terminated the proceeding. The Board's order rendered moot NWC's motion to reschedule.

On October 26th , petitioner appealed LBP-98-26 to the Commission, challenged the Policy Statement (CLI-98-12) as constituting an improper rulemaking, and essentially sought reconsideration of all prior Commission decisions in this proceeding (CLI-98-14, -15, and -19). Further, it sought review of the Board's September 21st Memorandum and Order denying NWC's request to delay the prehearing conference and also the Board's August 20th and September 29th orders declining to postpone the contention filing deadline. Both BG&E and the staff submitted briefs opposing NWC's appeal.

DISCUSSION

Last summer the Commission reexamined its hearing process and issued a policy statement (described above) designed to streamline it. Several considerations prompted the , among them the potential number of hearings the agency was facing and recent experience with innovative adjudicatory techniques. At the beginning of its policy statement, the Commission said,

With the potential institution of a number of proceedings in the next few years to consider applications to

renew reactor operating licenses, to reflect restructuring in the electric utility industry, and to license waste storage facilities, such assessment is particularly appropriate to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration. In its review, the Commission has considered its existing policies and rules governing adjudicatory proceedings, and innovative techniques used by our own hearing boards and presiding officers and by other tribunals.

CLI-98-12, 48 NRC at 1. Clearly, one of the Commission's leading considerations was the need to deal with license renewal in a fair and efficient way.

The Commission has long understood that the potential was there for a large number of utilities to seek license renewal soon, and that the renewal process would have to be both fair and efficient. Over the next twenty years, a little more than half the licenses for operating power reactors will expire (USNRC Information Digest, NUREG-1350, Vol. 10 (1998) at 49). There are already fifty- five units at thirty-eight sites eligible to apply for renewal licenses (id.). As the Commission said in 1991 when it first issued regulations on license renewal:

In proposing the earliest date of application, the Commission considered the time necessary to plan for replacement of retired nuclear plants. Industry studies estimate that the lead time necessary for utilities to build a new electric generation plant is 10 to 12 years for fossil fuels and 12 to 14 years for nuclear or other new technologies. When the staff review is factored into the decision process, the Commission concludes that applications 18-20 years before expiration are not unreasonable. For these reasons, the

final rule permits application for a renewed license to be filed 20 years before expiration of the existing operating license. Final Rule, "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,963 (Dec. 13, 1991).

Similarly, decisions to invest in major replacements, such as steam generators, must be made early in a licensee's consideration of a renewal decision (NRC, The Price-Anderson Act ... A Report to Congress, NUREG/CR-6617 (Oct. 1998) at 26-27). Several sites have already announced that they will not seek renewal. After adding to the ten to fourteen years the three or more years the Commission was predicting in 1991 it would take the agency to review and reach a decision on an application for renewal, the Commission concluded that it would be reasonable to expect applications to come in as early as twenty years before their expirations, and so allowed in Part 54 of its regulations. 56 Fed. Reg. 64,963.

In light of these factors, the Commission has long understood the need for a predictable and stable license renewal process. In publishing revisions to the license renewal rule in 1995, the Commission noted that, as early as 1993, it had informed the staff that: "it is essential to have a predictable and stable regulatory process clearly and unequivocally defining the Commission's expectations for license renewal. This process would permit licensees to make decisions about license renewal without being influenced by a regulatory process that is perceived as uncertain, unstable, or not clearly defined."Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22,462 (May 8, 1995).

With an eye on achieving "a prompt and fair resolution

of proceedings," the Policy Statement sought "to ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration." Policy Statement, CLI-98-12, 48 NRC at 18. Commission and Board scheduling orders in the current case reflect the concerns set out in the Policy Statement. *See* CLI-98-15, 48 NRC at 50.

NWC maintains that efforts by the Commission and the Board to expedite the Calvert Cliffs proceeding have resulted in a process that denies NWC a fair opportunity to make its case against license renewal. NWC's appeal raises numerous, often overlapping, procedural questions. Rather than address the same arguments repeatedly in different contexts, we break them below into several broad categories. Much of NWC's appellate brief simply recapitulates what NWC has argued to the Commission twice previously, both when it asked the Commission to vacate its original order referring this proceeding to the Licensing Board and when it sought Commission review of the Board's original scheduling orders. We continue to find NWC's claims unpersuasive, largely for the same reasons we have given before. *See* CLI-98-19, 48 NRC 132 (1998); CLI- 98-15, 48 NRC 45 (1998).

In considering NWC's procedural arguments one more time, we remain mindful of our "broad regulatory latitude" under the Atomic Energy Act to establish our "'own rules of procedure ... and methods of inquiry.'" *Nuclear Information Resource Service v. NRC*, 969 F.2d 1169, 1177 (D.C. Cir. 1992) (en banc), *quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543 (1978); *see Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53-54 (D.C. Cir. 1990). Only if we were convinced that the efficiency measures we and the Board have taken

were unlawful or unjust would we backtrack from them. We are not so convinced.

A. Commission Authority to Modify its Procedures by Policy Statement

NWC asserts that our Policy Statement, CLI-98-12, amounts to an unlawful rule because it was issued without the prior notice and opportunity for comment required under the Administrative Procedure Act ("APA"). *See* Appeal at 8-9. We disagree. The Policy Statement reduced no one's substantive rights and changed no basic procedures. It simply updated the Commission's prior procedural guidance to the Boards (issued in 1981) and suggested various procedural devices designed to foster more efficient and expeditious proceedings. *See* CLI- 98-15, 48 NRC at 51. It continued the Commission's policy of giving the Boards sufficient discretion to handle cases in a way that ensures fair and accurate decisionmaking. *See* Policy Statement, CLI-98-12, 48 NRC at 20. In sum, CLI-98- 12 is no more than it purports to be, a policy statement on adjudicatory procedures, and therefore it did not require notice-and-comment in advance of issuance. *See* 5 U.S.C. s 553 ("statements of policy" and "rules of agency organization, procedure, or practice" exempt from notice-and-comment requirement); *see generally Troy Corp. v. Browner*, 120 F.3d 277, 287 (D.C. Cir. 1997); *American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046-47 (D.C. Cir. 1987).

B. Commission Authority to Modify its Procedures on a Case-By-Case Basis

1. Extensions of Time

NWC asserts, as it has before, that the Commission inappropriately changed the standard for granting extensions of time by establishing an "unavoidable and extreme circumstances" test (set forth both in the Policy Statement, CLI-98-12, 48 NRC at 21, and in CLI-98-14, 48 NRC at 44) in lieu of the "good cause" test set forth in 10 C.F.R. § 2.711(a). NWC argues that the Commission imposed this new standard without reference to the record in this proceeding, without support of substantial evidence, and in violation of both the APA and the Commission's own regulations (section 2.711(a)). *See* Appeal at 6, 10, 17. Earlier in this proceeding, we considered and rejected this very argument. *See* CLI-98-15, 48 NRC at 53 and n.5. NWC in its appeal has given us no reason to depart from that ruling. We continue to believe that our construction of "good cause" to require a showing of "unavoidable and extreme circumstances" constitutes a reasonable means of avoiding undue delay in this important license renewal proceeding, and for assuring that the proceeding is adjudicated promptly, consistent with the goals set forth in the Policy Statement and the APA.[2]

---

[2]The Board's application of the "unavoidable and extreme circumstances" test to petitioner was consistent with not only the Commission's own directive in CLI-98-14 and Policy Statement (CLI-98-12, 48 NRC at 21) but also with the Board's own extensive authority under 10 C.F.R. § 2.718 to schedule and regulate proceedings. Petitioner argues that 10 C.F.R. § 2.3 requires the Commission and the Board to apply the "specific rule" of section 2.711(a) setting forth the "good cause" standard rather than the "general rule" of section 2.718 permitting the Board to establish the proceeding's schedule. We see no conflict between the two rules. In any event, section 2.3 applies only to conflicts between rules within Part 2, Subpart G and rules outside that subpart. It is irrelevant to purported conflicts between rules within Subpart G.

In any event, throughout this proceeding, NWC has provided the Board and the Commission only the scantiest of details regarding its health-and-safety or environmental concerns. Prior to its October 1st deadline for filing contentions, NWC had more than five months within which to prepare contentions, yet it offered no meaningful explanation of the grounds for its opposition to BG&E's application. It merely stated, in the most general terms possible, that it doubts the plant "can safely operate past [its] original specified lifetime" and that license renewal "poses an unacceptable health and safety risk to the public." *See* Petition for Intervention, dated Aug. 7, 1998, at 4. Prior to October 1st, NWC's pleadings never expanded on either of these conclusory statements. NWC's complete failure to provide specific information about its concerns precluded any finding that "good cause," in a meaningful sense, justified NWC's requested extensions of time prior to that date. (Later in this order, we find that NWC's October 1st and 13th filings offer similarly insufficient explanation of its health-and safety and environmental concerns.)[3]

---

[3]NWC offers two related arguments -- (1) that the Board applied the new standard selectively by not applying it to the NRC staff and to BG&E when giving them more time in which to respond to any contentions NWC might file on October 1st , and (2) that the Board ignored recent precedent in which two of the instant Board's members applied the "good cause" rather than the "unavoidable and extreme circumstances" standard in another proceeding. *See* Appeal at 19-20. These arguments warrant only brief responses. The first is unpersuasive as the Board order did not address a motion for an extension of time, for good cause or otherwise, but simply provided a schedule that gave the staff and BG&E response times "roughly equivalent" to NWC's time to prepare initial pleadings. *See* LBP-98-26, 48 NRC at ___, slip op. at 16 n.8. The second ignores the fact that unreviewed Board rulings do not constitute precedent or binding law at this agency. *See, e.g.*, Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1988)).

2. Milestones

NWC complains generally that CLI-98-14 inappropriately established an unalterable thirty-month schedule for this proceeding. *See* Appeal at 8, 10, 15. More specifically, NWC asserts that the Commission exceeded its authority when it instructed the Board to provide written explanations for any departures from the Commission's proposed timetable and then to restore the proceeding to the proposed timetable. Id. at 8. Therefore, it asserts, the Board erred in following the Commission's milestones. Id. at 7. In CLI-98-15, the Commission rejected NWC's attack against our "milestones" approach and pointed out that our suggested milestones were neither inflexible nor bereft of mechanisms for taking unexpected developments into account. *See* 48 NRC at 51-52, 55-56.[4] We adhere to the views we expressed

---

[4]NWC asserts that the milestones and other procedural devices set out in the Commission's initial referral order (CLI-98-14, 48 NRC 39 (1998)) violate the APA's requirements that agencies conduct proceedings with "due regard for the rights and privileges of all the interested parties or adversely affected persons," taking into account the "conveniences and necessities of the parties or their representatives." *See* Appeal at 6, 14-15, citing 5 U.S.C. ss 554(b), 558(c)). We do not doubt our obligation to treat all parties to our proceedings fairly -- indeed, our original scheduling order could hardly have been clearer on our commitment to fairness (CLI-98-14, 48 NRC at 42-43) -- but we cannot see how our effort to expedite the Calvert Cliffs proceeding prejudiced NWC's right to participate meaningfully in it. In addition, as a formal matter, one of the APA provisions cited by NWC (5 U.S.C. s 554(b)) applies only to agency proceedings required by statute to be "on the record." *See* 5 U.S.C. s 554(a). The Commission's position, reiterated several times in recent years, is that NRC licensing proceedings are not governed by APA requirements for formal on- the-record adjudications, except in particular situations where Congress has so mandated. *See, e.g.*, Final Rule, "Streamlined

there.

3. Authority to Shorten Period for Filing Contentions

NWC argues that the Commission and the Board unlawfully shortened the period for filing proposed contentions by establishing a deadline earlier than fifteen days prior to the first prehearing conference. *See* Appeal at 6, 17-19. But, as we explained in CLI-98-15, "10 C.F.R. § 2.711 explicitly provides that the Commission may extend or shorten the time for action set forth in the rules and may set time limits where the rules do not prescribe a limit." 48 NRC at 53. We also stressed that: "the Commission has traditionally exercised plenary supervisory authority over its adjudications and adjudicatory boards. This authority allows it to interpret and customize its process for individual cases," *See, e.g.*, Safety Light Corp., CLI-92-13, 36 NRC 79, 91 (1992) (Commission exercises its authority to modify applicable procedural rules). Id.

More specific to the issue at bar, it has long been the practice at this agency that Boards may change the deadline for filing contentions to allow sufficient time for responses prior to the prehearing conference -- a practice which our Appeal Board explicitly approved at least twice, in situations all but identical to ours. *See Houston Power and Light Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 12-13 & n. 15 (1980); Houston Power and Light Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB- 565, 10 NRC 521, 523 (1979). As the Appeal Board commented in Allens Creek, "it makes a good deal of sense

---

Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998).

to structure the proceeding so that all participants know, before they arrive at the conference, what position the proponents of the plant are taking on the various contentions." 10 NRC at 523.

The regulation governing the filing period for proposed contentions states simply that they must be filed "not later than ... fifteen ... days prior to the holding of the first prehearing conference." 10 C.F.R. § 2.714(b)(1) (emphasis added). By its very terms, this regulation establishes only the latest time for filing proposed contentions; it nowhere precludes either the Board or the Commission from shortening that time frame. Indeed, section 2.718(e) provides the Board with broad authority to "[r]egulate the course of the hearing" and section 2.711(a) permits the Commission or Board to "shorten[]" regulatory time frames "for good cause."[5] The Board here had "good cause" in that the alteration of the time frame[6] would permit the Board and

---

[5]10 C.F.R. §§ 2.718(e), 2.711(a). *See also* Policy Statement, CLI-98-12, 48 NRC at 20; Final Rule, "Restructuring of Facility License Application Review and Hearing Processes," 37 Fed. Reg. 15,127, 15,129 (1972) (the Statement of Consideration which the Commission issued when promulgating section 2.711): "Many of the time limitations prescribed by the current rules were set to allow the maximum time for the parties to the proceedings to perform various activities. There are instances where the activities covered by the limitations can be performed in much less time. In appropriate cases where it would not prejudice a party, the presiding officer is authorized to reduce the time limits by order." (Emphasis added.)

[6]In claiming that the Board "shortened" the time frame within which NWC was required to submit its contentions, NWC improperly relies on the fact that Board postponed the prehearing conference by more days than it postponed NWC's contentions deadline. This comparison gives the superficial -- and incorrect -- impression that the Board actually reduced the number of days available to NWC (from 15 days prior to the conference

NWC to consider the staff's answer to the proposed contentions prior to the scheduled date of the prehearing conference (pursuant to 10 C.F.R. § 2.714(c), the staff's answer would otherwise be due the day of the prehearing conference).

Moreover, in setting an October 1st filing deadline for contentions, the Board properly concluded that NWC would have by then had ample time within which to develop contentions -- a conclusion with which we agree. To paraphrase only slightly our comment in CLI-98-19: by October 1st , NWC had had more than five months (157 days) since the April 27th publication of the NRC's notice of the application's filing (63 Fed. Reg. 20,663), more than four months (135 days) since the May 19th publication of the NRC's notice of acceptance for docketing of BG&E's application (63 Fed. Reg. 27,601), nearly four months (113 days) since the NRC announced the beginning of the public scoping process under the National Environmental Policy Act (63 Fed. Reg. 31,813 (June 10, 1998)), and nearly three months (85 days) since the NRC published the Notice of Opportunity for Hearing (63 Fed. Reg. 36,966 (July 8, 1998)). *See* CLI-98-19, 48 NRC at 134 n.1.[7]

---

to 42 days prior thereto). Contrary to NWC's argument, the period for filing contentions was in fact lengthened twice -- from September 17th to 30th and later, as a further accommodation, from September 30th to October 1st

[7]NWC also argues that, under 10 C.F.R. § 2.3, the general rule set forth in section 2.718 must yield to the specific fifteen-day rule in section 2.714(b)(1). *See* Appeal at 18. As noted earlier, petitioner misreads section 2.3. That section applies only to conflicts between Subpart G rules and rules outside Subpart G; it does not govern conflicts within that subpart. In any event, we do not consider sections 2.714(b)(1) and 2.718 to be at odds

4. Sua Sponte Board Contentions

NWC challenges the Commission's caveat in its July Policy Statement and CLI- 98-14 that the Boards interject their own contentions sua sponte only in "extraordinary" circumstances. According to petitioner, this caveat not only has the effect of "chill[ing]" the Board's willingness to raise health-and- safety contentions on its own motion but also results in a substantive change in our regulations, requiring notice and comment. *See* Appeal at 5-6, 8, 10, 11- 12. In refusing to vacate our original referral order, we rejected essentially the same NWC argument. *See* CLI-98-15, 48 NRC at 55. As we pointed out there:

> The extent of the Board's authority to raise contentions sua sponte is a matter within the Commission's supervisory authority, and depends largely on an appropriate division of authority between the Board and the agency's regulatory staff -- a question of resources and expertise peculiarly within the Commission's province to decide.[8] [9]

---

with each other. The former establishes a "default" filing deadline for contentions in proceedings in cases where the Board issues no order under sections 2.711 and 2.718(e) setting such a deadline.

[8]Moreover, the sua sponte standards to which Petitioner objects mirror the language in 10 C.F.R. § 2.760a....

[9]It is difficult to understand, in any event, what relevance the sua sponte question has to NWC's current appeal. Given NWC's failure to raise any admissible contentions itself, the Board has had no occasion to raise contentions sua sponte and, indeed, lacks authority to do so. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91- 13, 34 NRC 185, 188-89 (1991).

C. Timeliness of Purported "Contentions" Submitted October 1st

On appeal, NWC asserts, for the first time, that in actuality it filed timely contentions in its October 1st "Reply to the NRC Staff and BG&E's Answer to NWC's Petition to Intervene and Request for Hearing." *See* Appeal at 4, 23, citing Reply at 11. NWC's supposed "contentions" state as follows:

> [T]he original Petition to Intervene does indicate a redressable injury. NWC alleged that BGE cannot safely operate Calvert Cliffs Units 1 and 2 past the original specified lifetime and that if the renewal license was extended it would pose an unacceptable health and safety risk. NWC also requested that the licensee not be granted its renewal license until after it has demonstrated at a hearing that BGE can safely operate Calvert Cliffs Units 1 and 2 for the requested renewal term of 20 years and that the operating license not be renewed until such time as it is determined that the plant can, in fact, be operated safely and within the bounds of the law for the requested renewal term.

We find NWC's position disingenuous. On its face, NWC's "Reply" did not purport to advance contentions. It merely made arguments supporting NWC's argument that its Petition to Intervene had asserted a "redressable" injury, for purposes of standing to intervene. Indeed, NWC's Reply stated both that "NWC is not required to file its list of contentions at this time" and that "[b]efore considering the issues of specificity, particularity and redressability, NWC must be afforded the opportunity to file ... its list of contentions ...." Reply at 10. NWC's after-the-fact restyling

of its Reply as a "contentions" filing is incompatible with these statements' clear implication that NWC had not yet filed contentions. NWC's restyling also cannot be squared with its oft-repeated assertions that it need not file contentions until fifteen days prior to the prehearing conference and that the Board allotted insufficient time to prepare contentions. *See, e.g.*, NWC "Status Report," filed October 1, 1998, at 2 (demanding "adequate time to review the relevant material and set forth contentions").

More fundamentally, NWC's Reply nowhere satisfies, or attempts to satisfy (or even refers to), any of the "contention" requirements of 10 C.F.R. § 2.714(b)(2): that petitioner provide "a brief explanation of the bases of the contention;" "a concise statement of the alleged facts or expert opinion which support the contention;" "those specific sources and documents ... on which the petitioner intends to rely ...;" "sufficient information ... to show that a genuine dispute exists;" and either "references to the specific portions of the application ... that the petitioner disputes and the supporting reasons for each dispute" or "identification of each failure" "to contain information on a relevant matter as required by law." Indeed, NWC's Reply ignores not only these regulatory requirements but also explicit instructions in both the Policy Statement and CLI-98-14 on contention-specificity. CLI-98-14, 48 NRC at 41; CLI-98-12, 48 NRC at 22.

For all these reasons, we reject NWC's belated argument that its October 1st Reply can be construed as including timely-filed contentions.

D. Satisfaction of Late-filing Criteria by Contentions Submitted October 13th

NWC next asserts that the Board erred in failing to balance the late-filing criteria of 10 C.F.R. § 2.714(a)(1)[10] prior to rejecting as untimely two contentions presented for the first time in NWC's October 13th Notice of Filing. *See* Appeal at 23-24. In that Notice, NWC contended that the license renewal application (1) is incomplete and must be withdrawn and/or summarily dismissed, and (2) fails to meet the aging and other safety-related requirements mandated by law and/or NRC regulations. *See* Petitioner's Notice of Filing, dated Oct. 13, 1998, at 1-2. But, as the Board pointed out, NWC failed even to address our late-filing criteria, and that default alone warrants rejection of late-filed contentions. *See* LBP-98-26, 48 NRC at ____, slip op. at 13-14.

NWC misconstrues our regulations when it asserts (Appeal at 24) that it is the Board's burden to show that untimely contentions do not satisfy our late-filed requirements. Rather, longstanding NRC practice obliges petitioner to show that its contentions satisfy those requirements.[11] Indeed, the Commission has itself summarily

---

[10]These five factors are: (i) good cause for failure to timely file, (ii) availability of other means of protecting petitioner's interests, (iii) extent to which petitioner's involvement may assist in the development of a sound record, (iv) extent to which existing parties will represent petitioner's interests, and (v) extent to which petitioner's participation will broaden the issues or delay the proceeding.

[11]*See, e.g., Texas Util. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69 (1992) ("petitioner must ... demonstrate that a balancing of the five criteria set forth in 10 C.F.R. § 2.714(a)(1)(i)- (v) weighs in favor of their intervention"); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982) ("the State has an extremely heavy burden to justify an intervention petition on those latter issues"); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352

dismissed petitioners who failed to address the five factors for a late-filed petition.[12] NWC also argues that the Board erred in preventing NWC from arguing at a prehearing conference that it had satisfied the late-filing standards. See Appeal at 7. NWC's failure to address the required standards in its written October 13th submission prevents it from now complaining that it was denied an opportunity to do so, orally, at a prehearing conference.[13]

(1980) ("Needless to say, the late petitioner must address each of those five factors and affirmatively demonstrate that, on balance[,] they favor permitting his tardy admission to the proceeding"). Given that NWC is in essence (though not in form) seeking an order permitting it to raise late-filed contentions, our conclusion in the text is also consistent with 10 C.F.R. § 2.732 that "the applicant or the proponent of an order has the burden of proof."

[12]Texas Util, Elec. Co. (Comanche Peak Steam Elec. Station, Unit 2), CLI- 93-11, 37 NRC 251, 255 (1993). *See also Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-66 (1985) ("given its failure even to address the section 2.714 lateness factors, [the] intervention petition was correctly denied because it was untimely"). Moreover, based on our review of the current record in this proceeding, it would seem unlikely that NWC could have satisfied the late-filing criteria, even had it tried. The most important criteria by far is "good cause." It seems to us beyond dispute that, by October 1st , NWC had been given ample time within which to develop its contentions in this proceeding.

[13]NWC points to a recent case, *Private Fuel Storage, L.L.C.* (ISFSI), LBP- 98-7, 47 NRC 142 (1998), where a Board permitted a petitioner to appear at the prehearing conference and to argue that its contentions satisfied the late- filing criteria. *See* Appeal at 20. Assuming that NWC's representations regarding the Board's action in Private Fuel Storage are correct, the Board's decision would not support NWC's position. First, it would have been merely an act of discretion on the Private Fuel Storage Board's part. *See Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 (1985). Second, as noted in note 3, supra, Board rulingsnot reviewed on appeal do not constitute

E. Admissibility of Contentions

NWC's two October 13th contentions not only were impermissibly late, but they also failed to meet our specificity requirements for contentions. The only basis NWC offers in support of its two late-filed contentions is the existence of the NRC staff's requests for additional information, or "RAIs." NWC provides no explanation how or why the RAIs are germane to either contention. This omission contravenes our regulatory requirements that a contention be accompanied by

> [a] concise statement of the alleged facts or expert opinion which support the contention ..., together with references to those specific sources and documents ... on which the petitioner intends to rely [and also] ... [s]ufficient information ... to show that a genuine dispute exists with the applicant on a material issue of law or fact ... includ[ing] references to the specific portions of the application ... that the petitioner disputes and the supporting reasons for each dispute.

---

precedent at this agency and therefore do not bind other Boards. Third, the actual controlling Commission precedent on this issue yields the opposite result from that sought by NWC. In Pilgrim, 22 NRC at 468, the Appeal Board concluded that a petitioner had "no right to respond to the applicant and staff answers to his petition -- i.e., a second opportunity to make the 'substantial showing' on the five lateness factors that should have been included in the petition itself.... [A]lthough the Licensing Board might have accorded him that opportunity as a matter of discretion, it was not obliged to do so." (Emphasis in original.) *See also id.* at 467 n.22 ("late petitioners [[[']] obligation is to establish affirmatively at the threshold (i.e., in the late petition itself) that a balancing of the five lateness factors warrants overlooking the tardiness").

10 C.F.R. § 2.714(b)(ii)-(iii) (emphasis added). *See also Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). Mere reference to documents does not provide an adequate basis for a contention. *See Public Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989). This absence of specificity and support is, without more, a sufficient ground for rejecting the two contentions. *See Sacramento Munic. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144 (1993) (upholding Board ruling that the petitioner's "assertion did not comply with specific pleading requirements for admissible contentions in that [[[petitioner] failed to describe the matters to which Staff questions are addressed or why they might constitute a defect in the Environmental Report"). "Neither Section 189a of the Atomic Energy Act nor s 2.714 ... permits the filing of a vague, unparticularized contention." *See* Final Rule, "Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

NWC attempts to excuse its failure to submit specific contentions on the ground that the staff's failure to submit RAIs to the Board created a "glaring inadequacy in the record" and called for a postponement of the contentions deadline to allow an examination of the RAIs and BG&E's responses. *See* Appeal at 7, 20-21. But our regulations do not require the staff to submit RAIs to the Board or to serve them on petitioners. Rancho Seco, 37 NRC at 152-53. Under our longstanding practice, contentions must rest on the license application, not on NRC staff reviews. The Statement of Consideration accompanying our Contentions Rule (section 2.714) made our approach entirely clear:

> The Commission ... disagrees with the comments that s 2.714(b)(2)(iii) should permit petitioner to show ... that petitioners not be required to set forth facts in support of contentions until the petitioner has access to NRC reports and documents.... [B]ecause the license application should include sufficient information to form a basis for contentions, we reject commenters' suggestions that intervenors not be required to set forth pertinent facts until the staff has published its FES [Final Environmental Impact Statement] and SER [Safety Evaluation Report].54 Fed. Reg. at 33171. Accord, Rancho Seco, 37 NRC at 153-54.

Contrary to NWC's view (Appeal at 7, 21-23), the NRC staff's mere posing of questions does not suggest that the application was incomplete, or that it provided insufficient information to frame contentions, and NWC has cited no language in the RAIs suggesting otherwise. Indeed, were the application as rife with serious omissions as NWC suggests, then NWC should have had no problem identifying such inadequacies -- yet NWC has not done so. What NWC ignores is that RAIs are a standard and ongoing part of NRC licensing reviews. Questions by the NRC regulatory staff simply indicate that the staff is doing its job: making sure that the application, if granted, will result in safe operation of the facility. The staff assuredly will not grant the renewal application if the responses to the RAIs suggest unresolved safety concerns.

The regularity of the RAI process can be seen in Commission's Notice of Acceptance For Docketing of the Application, which expressly stated that although the staff had "determined that BG&E has submitted information ... that is complete and acceptable for docketing," "[t]he

docketing of the renewal application does not preclude requesting additional information as the review proceeds, nor does it predict whether the Commission will grant or deny the application." 63 Fed. Reg. 27,601 (May 19, 1998). Likewise, our rules specify that "[d]uring review of an application by the staff, an applicant may be required to supply additional information." 10 C.F.R. § 2.102(a).

The Commission considers many applications sufficiently complete for purposes of docketing, and for starting the adjudicatory process, even though the staff subsequently poses questions to the applicants regarding those applications. For instance, the Commission in Curators of the University of Missouri, CLI-95- 8, 41 NRC 386, 395 (1995), ruled that an "application may be modified or improved as NRC review goes forward" and that any view to the contrary "is incompatible with the dynamic licensing process followed in Commission licensing proceedings." As we stated above, it is the license application, not the NRC staff review, that is at issue in our adjudications. *See, e.g., id.* at 395-96; *Rancho Seco*, 37 NRC at 146-47. The NRC staff will consider and resolve all safety questions regardless of whether any hearing takes place. NWC can trigger a separate adjudicatory review only if it comes forward with timely and concrete concerns of its own.

As the Board pointed out, "[t]his is not to say" that RAIs are always "irrelevant to the adjudicatory process." *See* LBP-98-26, 48 NRC at ___, slip op. at 19. "[I]f a petitioner concludes that a staff RAI or an applicant RAI response raises a legitimate question about the adequacy of the application, the petitioner is free to posit that issue as a new or amended contention, subject to complying with the late-filing standards of section 2.714(a)." *Id. See, e.g., Louisiana*

Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338-39 (1991). Indeed, one reason for having a generic late- filed contention provision in the regulations is to have a logical, pre-noticed method for intervenors to raise concerns in proceedings that relate to newly- developed information. Here, NWC has done nothing like this, offering no specific safety concerns arising out of the RAIs but choosing instead to rest on their mere existence. If the Commission were to take NWC's preferred approach, and allow petitioners to await completion of the RAI process before framing specific contentions, the hearing process frequently would take months or years even to begin, and expedited proceedings, such as the Commission contemplated for license renewal, would prove impossible.

F. Propriety of Board's stay of discovery from NRC Staff

NWC challenges the Commission's directive in CLI-98-14, 48 NRC at 42, staying all discovery against the staff. Petitioner claims that this directive was not prompted by a request from a party, was not based on evidence (let alone substantial evidence), and did not permit NWC an opportunity to oppose the ruling. *See* Appeal at 10, 12, 13. NWC loses sight of the fact that this directive in CLI-98-14 had its origin in the Policy Statement, CLI-98-12, 48 NRC at 24,[14] and that policy statements need not be based on

---

[14]"Except for establishment of the case file, generally the licensing board should suspend discovery against the Staff until the Staff issues its review documents regarding the application. Unless the presiding officer has found that starting discovery against the Staff before the Staff's review documents are issued will expedite the hearing, discovery against the Staff on safety issues may commence upon the issuance of the SER, and discovery on environmental issues upon issuance of the FES."

evidence in one individual case. There is, in any event, ample and obvious reason for the Commission's directive: the Commission was determined that the NRC staff complete its safety and environmental reviews promptly, without simultaneously facing the unnecessary distraction of discovery. The Commission's approach allows for discovery against the NRC staff at an appropriate time.

NWC nonetheless asserts that the Board erred in denying NWC's motion to delay the prehearing conference and the contention deadline until NWC had been given the opportunity to conduct discovery of the staff pursuant to 10 C.F.R. §§ 2.740(b) & (c), 2.752. *See* Appeal at 12 n.10, 21. This assertion contravenes the terms of the cited regulation, as well as longstanding NRC case law. Sections 2.740 and 2.752 apply only to "parties" -- a status NWC does not have in this proceeding. Moreover, other regulations applicable to obtaining discovery from the staff likewise apply only to "parties." *See* 10 C.F.R. §§ 2.720(h)(2)(ii), 2.744(a)-(e). Finally, as the Board correctly pointed out in its September 21st order (slip op. at 2): "longstanding agency precedent precludes an intervenor from obtaining discovery to assist it in framing contentions." *See* Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192, reconsid'n denied, ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973). *See also Wisconsin Elec. Power Co.* (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928, 929 (1974); *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 n.12, 468 (1982).

When promulgating the Contentions Rule in 1989 the

Commission stated, in words fully applicable here:

> We reject the arguments that the new rule is unfair and a denial of due process because it requires intervenors to allege facts in support of its contention before the intervenor is entitled to discovery. Several months before contentions are filed, the applicant will have filed an application with the Commission, accompanied by multi-volume safety and environmental reports. These documents are available for public inspection and copying in the Commission's headquarters and local public document rooms.... [This] rule will preclude a contention from being admitted where an intervenor has no facts to support its position and ... contemplates using discovery ... as a fishing expedition which might produce relevant supporting facts. The Commission does not believe this is an appropriate use of discovery....54 Fed. Reg. at 33,170-71.

Over the years, our requirement that contentions rest on the license application rather than on the NRC staff's review has not prevented innumerable petitioners, some quite recently, from framing admissible contentions and moving forward toward a hearing. *See, e.g., Private Fuel Storage*, L.L.C. (ISFSI), LBP-98-7, 47 NRC 142 (1998). NWC, however, has failed to do so.

G. Purported Ex Parte Contacts

NWC claims that wrongful ex parte contacts between the Commission and the NRC staff or BG&E are somehow suggested by the Commission's establishment of milestones in CLI-98-14, by its guidance in the same order regarding a stay of discovery against the staff, and by the Board's failure

in its September 29th order to require BG&E and the staff to meet the purportedly heightened standard for extensions of time. *See* Appeal at 6, 12, 14, 19-20. But BG&E and the NRC staff sought no extensions of time, so NWC's implication that the Board failed to act evenhandedly on extension requests is incorrect. Moreover, the Commission's inclusion of the milestone and discovery sections of CLI-98-14 is in fact attributable to a cause much more benign than supposed improper influence -- they each derive directly from similar terms in the Commission's earlier Policy Statement. Compare CLI-98-12, 48 NRC at 20 (regarding the expeditious handling of proceedings and the authority to modify filing deadlines), 21 (regarding the establishment of milestones), 24-25 (regarding the stay of discovery against the staff). NWC points to no actual evidence of improper ex parte contacts by BG&E or separation-of-functions contacts by the staff, nor are we aware of any.

CONCLUSION

For all the reasons set forth above, as well as the reasons set forth in LBP-98-26, NWC's appeal is denied and LBP-98-26 is affirmed.[15]

IT IS SO ORDERED.
For the Commission
John C. Hoyle
Secretary of the Commission
Dated at Rockville, Maryland, this 23rd day of December, 1998.

---

[15]As an alternate ground for affirmance, BG&E argues that NWC has not demonstrated standing to intervene. Like the Licensing Board, we do not reach the standing question in light of NWC's failure to file any timely contentions.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-98-26

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Thomas D. Murphy

In the Matter of BALTIMORE GAS AND ELECTRIC COMPANY (Calvert Cliffs Nuclear Power Plant, Units 1 & 2)	Docket Nos. 50-317-LR 50-318-LR ASLBP No. 98-749-01-LR

October 16, 1998

MEMORANDUM AND ORDER
(Denying Intervention Petition/Hearing Request and Dismissing Proceeding)

Petitioner National Whistleblower Center (NWC) has pending before the Licensing Board a petition to intervene

and request for a hearing in connection with the application of Baltimore Gas and Electric Company (BG&E) for renewal of the 10 C.F.R. Part 50 operating licenses for the two units of its Calvert Cliffs Nuclear Power Plant located near Lusby, Maryland. Commission and Board directives mandated that for NWC contentions regarding the BG&E application to be timely, the contentions and supporting bases had to be submitted by October 1, 1998. On that date, however, NWC failed to provide its issue statements. Instead, NWC waited until October 13, 1998 to submit two contentions, albeit without addressing the standards governing the admissibility of late-filed contentions. Both BG&E and the NRC staff urge us to reject the NWC hearing request because it has failed to submit any admissible contentions as required by Commission regulations.

For the reasons set forth below, we deny NWC's intervention petition/hearing request and terminate this proceeding.

I. BACKGROUND

Following receipt of BG&E's Calvert Cliffs license renewal application in April 1998, see 63 Fed. Reg. 20,663 (1998), on July 1, 1998, the agency issued a Federal Register notice that provided an opportunity for a hearing for the applicant or anyone affected by the proceeding. See 63 Fed. Reg. 36,966 (1998). Petitioner NWC responded on August 7, 1998, with a timely intervention petition/hearing request indicating it wished to challenge the BG&E renewal request. In its petition, NWC asserted it had standing to intervene as the representative of two NWC officers, one of whom is also an NWC employee and one of whom is a Board of Directors

member.[1] See Petition to Intervene and Request for Hearing of [NWC] (Aug. 7, 1998) at 2-3.

Twelve days later, the Commission issued an order referring the NWC petition to the Atomic Safety and Licensing Board Panel to conduct an adjudicatory hearing, as appropriate. See CLI-98-14, 48 NRC __, __ (slip op. at 8) (Aug. 19, 1998). Among other things, in its referral order the Commission provided guidance on a schedule for conducting any adjudication, including a ninety-day time frame from the date of the order for Licensing Board issuance of a decision on whether NWC has standing and admissible contentions so as to merit admission as a party. See id. at __ (slip op. at 5-6).

That same day, this Board was established to rule on the NWC hearing request. See 63 Fed. Reg. 45,268 (1998). The following day we issued an initial prehearing order. Consistent with the Commission's guidance on the timing for Board issuance of a ruling on NWC's intervention request, in that order we established a schedule of August 24 and August 27, 1998, respectively, for BG&E and staff answers to the NWC petition, see 10 C.F.R. § 2.714(c), and gave NWC until September 11, 1998, to supplement its hearing petition, including providing its list of contentions and supporting bases, see id. § 2.714(a)(3), (b)(1). Also in that order, we gave the applicant and the staff until October 2, 1998, to respond to NWC's supplement and announced the Board's intent to hold a prehearing conference the week of

---

[1] In the petition, NWC also declared that if the organization was denied standing, the two individuals it was representing then wished to proceed as intervenors in their personal capacity. See Petition to Intervene and Request for Hearing of [NWC] (Aug. 7, 1998) at 3.

October 13, 1998, to entertain oral arguments concerning NWC's standing to intervene and the admissibility of any proffered contentions. See Licensing Board Memorandum and Order (Initial Prehearing Order) (Aug. 20, 1998) at 2-4 (unpublished).

One day later, NWC filed a motion for an enlargement of time to postpone the proposed date for the prehearing conference. In its request, NWC asserted it needed approximately two additional months to retain experts and allow them to prepare its contentions for filing. It also declared that any new schedule for filings had to conform to the provisions of 10 C.F.R. § 2.714(b)(1), which provides that an intervention petition may be supplemented with a list of contentions without permission of the presiding officer any time up to fifteen days before the first prehearing conference is held. See Petitioner's Motion for Enlargement of Time (Aug. 21, 1998) at 1-4. Both BG&E and the staff opposed the petitioner's extension request. See [BG&E] Answer Opposing Petitioner's Motion for Enlargement of Time (Aug. 24, 1998) at 1; NRC Staff's Answer to Petitioner's Motion for Enlargement of Time (Aug. 26, 1998) at 1. In addition, both these participants submitted answers that questioned the efficacy of NWC's intervention petition, as filed, particularly its standing to intervene. See [BG&E] Answer to Petition to Intervene and Request for Hearing of [NWC] (Aug. 24, 1998) at 4-10; NRC Staff's Response to [NWC] Request for a Hearing and Petition to Intervene (Aug. 27, 1998) at 6-9.

On August 27, 1998, we denied the NWC extension request. In doing so, we noted that the petitioner had failed to make a showing sufficient to establish the requisite "'unavoidable and extreme circumstances'" required under the Commission's CLI-98-14 guidance. See Licensing Board

Memorandum and Order (Denying Time Extension Motion and Scheduling Prehearing Conference) (Aug. 27, 1998) at 2-3 (unpublished) (quoting CLI-98-14, 48 NRC at __ (slip op. at 6)) [hereinafter August 27 Issuance]. We also found no basis for its argument that section 2.714 provided an absolute right to file contentions up to fifteen days before the initial prehearing conference. That provision, we observed, operates only in the absence of a presiding officer's action in accordance with 10 C.F.R. §§ 2.711(a), 2.718, setting a specific deadline for the filing of intervention petition supplements, including contentions. See id. at 3-4.

NWC responded to this denial by filing a pleading with the Board noting its disagreement with our ruling. See Petitioner's Filing in Response to the Board's Initial Prehearing Order (Sept. 11, 1998). In addition, NWC requested Commission interlocutory review of our determination. See Petition for Review (Sept. 11, 1998). Although declaring it was not dissatisfied with the Board's August 27 extension denial decision, the Commission nonetheless granted the NWC petition for review and provided NWC an additional two and one-half weeks to submit its contentions. See CLI-98-19, 48 NRC __, __ (slip op. at 2-3) (Sept. 17, 1998). In addition, the Commission stated that "[t]he Board should be prepared to terminate the adjudication promptly should NWC submit no admissible contentions." Id. at __ (slip op. at 2).

Within a day of this Commission directive, the petitioner filed a new motion requesting that the Board postpone holding a prehearing conference until it had conducted discovery to aid in the preparation of its contentions. See Petitioner's Motion to Vacate Pre-Hearing Conference or in Alternative for an Extension of Time (Sept. 18, 1998). We

denied this motion, noting that longstanding agency precedent precludes a petitioner from obtaining discovery to assist it in framing contentions. See Licensing Board Memorandum and Order (Scheduling Matters and Electronic Hearing Database) (Sept. 21, 1998) at 2 (unpublished) [hereinafter September 21 Issuance]. In that same issuance, we also established a new date for BG&E and staff responses to any NWC petition supplement and tentatively scheduled the initial prehearing conference for the week of November 9, 1998. See id. at 3. Thereafter, taking into account participant input concerning scheduling conflicts, we set November 12, 1998, as the starting date for the initial prehearing conference. See Licensing Board Order (Revised Prehearing Conference Schedule) (Sept. 29, 1998) at 1 (unpublished).

On the October 1, 1998 date established for filing NWC's intervention petition supplement,[2] including its contentions and supporting bases, the petitioner submitted four documents. One was a reply to the BG&E and staff answers to its intervention petition contesting their arguments concerning NWC's standing to intervene. See [NWC] Reply to the NRC Staff and [BG&E] Answers to NWC's Petition to Intervene and Request for Hearing (Oct. 1, 1998). The second was a status report in which NWC provided a listing of the "experts" whom it asserts have agreed to assist it in the proceeding and the "areas of concern" those experts have

---

[2] In its September 17 issuance, the Commission set September 30, 1998, as the filing date for NWC's intervention petition supplement. See CLI-98-19, 48 NRC at ___ (slip op. at 2). Thereafter, as part of its September 18 filing, NWC requested a one-day religious holiday-related extension, which the Board subsequently granted. See September 21 Issuance at 2.

identified to be raised as contentions or bases for contentions. See Status Report (Oct. 1, 1998) at 2-10. In this filing, however, NWC repeatedly stated that the list of concerns was not to be considered a tabulation of contentions. See id. at 1, 2, 10. Instead, reiterating its position it was entitled to amend its petition up to fifteen days before the initial prehearing conference, NWC declared that under the Board's schedule, which it was again seeking to extend, it had until at least October 28 to file its contentions. See id. at 1.

Also in this vein, NWC filed a third document asking the Board to vacate its September 29 order establishing a mid-November date for the initial prehearing conference. See Petitioner's Motion to Vacate and Re-schedule the Pre-Hearing Conference (Oct. 1, 1998) [hereinafter Motion to Vacate]. According to NWC, this was necessary because BG&E would not be responding to an August 28, 1998 staff request for additional information (RAI) concerning the BG&E renewal application until after the prehearing conference. According to NWC, its experts need to review the applicant's RAI responses before they could render opinions upon which it would rely in formulating its contentions. See id. at 4-6.

The petitioner's final October 1 filing requested that the Board require the applicant and the staff to (1) put NWC and the Board on their service lists for all written communications relating to the Calvert Cliffs renewal application; and (2) give NWC written notification of all status meetings concerning the application before they are held. See Petitioner's Motion Requesting to be Informed of Communication between the NRC Staff and Applicant (Oct. 1, 1998) [hereinafter Communications Motion]. These measures are necessary, NWC declared, because a two-week delay in getting

application-related materials into the agency's public document room (PDR) had made it difficult for NWC to participate effectively in this otherwise expedited proceeding. See id. at 1-2.

Thereafter, as an apparent follow up to its October 1 request to change the November 12 initial prehearing conference date, on October 7, 1998, NWC submitted a filing listing an additional eighteen staff RAIs that were sent to the applicant, most of which were not received in the PDR until after October 1. See Petitioner's Notice of Filing (Oct. 7, 1998) at 2-4. In that pleading, NWC also complained of the staff's failure to notify NWC representatives about a September 28, 1998 meeting with BG&E and declared the nineteen staff RAIs make it apparent the BG&E renewal application was not sufficiently complete so as to be acceptable for docketing in accordance with various provisions of 10 C.F.R. Part 2, Subpart A. See id. at 5-6.

In responses to the petitioner's third and fourth October 1 submissions and NWC's October 7 filing,[3] BG&E declared (1) NWC's motion to reschedule the prehearing conference is really another inadequately supported request to extend the time for filing contentions that ignores prior Commission and Board rulings on the Board's authority to set a contentions filing deadline; (2) NWC's arguments regarding the need to delay contentions because of the staff RAIs is legally and factually inaccurate; (3) agency rules do not require that a petitioner be served with applicant and staff

---

[3] Applicant chose not to respond to NWC's October 1, 1998 status report because that filing did not contain contentions. See Letter from David R. Lewis, Counsel for BG&E, to the Licensing Board (Oct. 9, 1998).

correspondence; (4) NWC's argument about the sufficiency of the BG&E application has significant factual errors; and (5) NWC's intervention petition should be dismissed because it has failed to comply with the October 1, 1998 deadline for filing contentions. See BGE's Answer to Petitioner's Motion to Vacate and Reschedule the Pre-Hearing Conference (Oct. 9, 1998) at 2-10 [hereinafter BG&E Motion to Vacate Response]; BGE's Answer to Petitioner's Motion Requesting to be Informed of Communication between the NRC Staff and Applicant (Oct. 9, 1998) at 1; BGE's Answer to "Petitioner's Notice of Filing" (Oct. 9, 1998) at 1-2. Similarly, in its responses to the second, third, and fourth NWC October 1 pleadings and NWC's October 7 filing, the staff declared (1) without designating it as such, NWC is attempting to obtain an extension of the contentions filing date without demonstrating the requisite "unavoidable and extreme circumstances" in that (a) the staff's determination to accept the BG&E application for filing is not the subject of this proceeding, and (b) the applicant's responses to any staff RAIs can be addressed in late-filed contentions; (2) the Board acted within its authority in establishing the contentions filing deadline; (3) NWC has failed to demonstrate that it has been harmed by not being on the staff's document or public meeting distribution lists; and (4) NWC's intervention petition/hearing request should be denied because it failed to comply with the October 1, 1998 contentions filing deadline. See NRC Staff's Answer in Opposition to Petitioner's Motion to Vacate and Re-schedule the Pre-hearing Conference (Oct. 9, 1998) at 3-10; NRC Staff's Response to Status Report and Petitioner's Motion to be Informed of Communication between NRC Staff and Applicant (Oct. 9, 1998) at 4-8 [hereinafter Staff Status Report/Communications Motion Response].

Petitioner NWC subsequently made two additional submissions. On October 13, 1998, NWC filed a notice in which it set forth what are labeled its first supplemental set of contentions. As contention one, NWC proffers the following: "As a matter of law and fact, Baltimore Gas & Electric Company's (BGE) license renewal application to operate Calvert Cliffs Nuclear Power Plant (CNPP) Unit 1 and Unit 2 is incomplete and must be withdrawn and/or summarily dismissed."

Petitioner's Notice of Filing (Oct. 13, 1998) at 1. As the basis for this contention, NWC references the staff RAIs and the possibility of future RAIs. See id. at 2. NWC then set forth its second contention as follows: "As a matter of law and fact, Baltimore Gas & Electric Company's (BGE) license renewal application to operate Calvert Cliffs Nuclear Power Plant (CNPP) Unit 1 and Unit 2 fails to meet the aging and other safety-related requirements mandated by law and/or NRC regulations and must be denied."Id. at 2.

The basis given for these contentions is essentially the same as for contention one. See id. at 2-3. Finally, on October 15, 1998, NWC provided another notice of filing in which it lists additional staff RAIs that have recently come to its attention. These, it asserts, provide additional bases for its contentions as well as support for rescheduling the November 12 initial prehearing conference. See Petitioner's Second Notice of Filing (Concerning RAIs) (Oct. 15, 1998) at 1-4.

II. ANALYSIS

As we have noted, in its September 17 issuance giving NWC additional time to submit its contentions, the Commission advised us that an NWC failure to submit

admissible contentions should result in the prompt termination of this proceeding. See CLI-98-19, 48 NRC at _ (slip op. at 2). NWC did not file any contentions on or before the October 1 filing date set by the Commission (and the Board, see supra note 3). NWC did submit two contentions nearly two weeks after that date;[4] however, it made no attempt to show that either issue statement meets the 10 C.F.R. § 2.714(a) standards so as to permit late-filing.[5] By failing to address the five section 2.714(a) criteria that govern late-filed contentions, NWC has not met its burden to establish the admissibility of its two contentions. Cf. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991) (petitioner has burden to supply information necessary to demonstrate admissibility of contentions under 10 C.F.R. § 2.714(b)(2) criteria). If the October 1 contentions deadline thus is controlling, these contentions are not admissible and, in accordance with the Commission's September 17 directive, this proceeding must be terminated.

---

[4] Rather than submitting contentions, NWC designates "areas of concern" in its October 1 status report. See Status Report at 2-10. That label, however, has no meaning in the context of a formal adjudicatory proceeding conducted under 10 C.F.R. Part 2, Subpart G. Compare 10 C.F.R. § 2.714(b) (petitioner must submit contentions in Subpart G proceeding) with 10 C.F.R. § 2.1205(e)(b) (petitioner must submit areas of concern in 10 C.F.R. Part 2, Subpart L informal adjudication).

[5] Because this deficiency is so apparent, we see no need to call for applicant and staff responses to this filing. Moreover, because this defect supports rejection of these contentions, we need not reach the question of their sufficiency. Nonetheless, it seems apparent for the reasons we set forth below in discussing the staff application acceptance and license review process that the substantive validity of the two contentions is, at best, problematic. See infra pp. 17-19.

As a consequence, the only question we must answer relative to NWC's various filings is whether there is any cause that excuses NWC's failure to comply with the clearly established contentions filing deadline. NWC does not explicitly request an extension of the contention filing deadline or make any attempt to address the standard of "unavoidable and extreme circumstances" the Commission established for obtaining such a postponement. Rather, NWC again asserts its purported "rights" under 10 C.F.R. § 2.714(b)(1) to a filing deadline based on the date of the initial prehearing conference. It also suggests that ongoing staff and applicant written exchanges (i.e., the staff RAIs and applicant RAI responses) and status meetings regarding the renewal application provide sufficient cause to put off the scheduled prehearing conference and, with it, the filing deadline for NWC's contentions.

We need not dwell at any length on NWC's renewed challenge to the Board's authority to establish the October 1 deadline for filing contentions that is not tied to the initial prehearing conference date. As we noted in our August 27 order, the provisions of section 2.714 concerning amending and supplementing a hearing request/intervention petition set "an automatic outside limit for the filing of contentions, but only in the absence of licensing board action in accordance with its 10 C.F.R. §§ 2.711(a), 2.178[,] authority to regulate the proceeding by, among other things, setting schedules."[6]

---

[6] Section 2.714 contains two provisions concerning hearing request/intervention petition changes. Section 2.714(a)(3) relates to the filing of "amendments," while section 2.714(b)(1) concerns "supplements." The former provision generally relates to the ability of a petitioner to revise its showing regarding its standing to intervene, while the latter relates to the petitioner's list of contentions or issues. Relative to either provision, however, absent some Commission directive, it is the Board's prerogative under its general scheduling authority to override their "automatic" limits

August 27 Issuance at 3-4. Certainly, the Board's authority in this regard is well established in agency practice.[7] See, e.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 159-63, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998); General Public Utilities Nuclear Corporation (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 150-54 (1996). As before, we find this assertion meritless.

With this conclusion, and petitioner NWC's failure to make any attempt to obtain a timely extension of the October

---

as is warranted in a particular situation.

[7] The intervention petition amendment and contention supplement deadlines in paragraphs (a)(3) and (b)(1) of section 2.714 seemingly had more utility under earlier agency practice in construction permit and operating license (CP/OL) cases in which there was a recognized proximity presumption for standing and the threshold for admitting contentions was more relaxed. With the Commission's acknowledgment that any proximity presumption generally does not apply outside the CP/OL realm and the adoption of a higher contention admission threshold, see Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247 (1996); 54 Fed. Reg. 33,168, 33,168 (1989), petitioner submissions in support of standing and contentions generally have become more voluminous and complex, rendering insufficient the fifteen-day period allotted by these provisions for applicant and staff responses and Board review of amended/supplemental filings before the initial prehearing conference.

In this regard, petitioner NWC apparently perceives some inequality in our provision of more time for BG&E and staff contention supplement responses following the Commission's grant of additional time to NWC to prepare its contentions. See Motion to Vacate at 3 & n.1. This Board action, however, was nothing more than a practical recognition that the time afforded to draft pleading responses should, when possible, be roughly equivalent to the time allotted to prepare the initial pleading. See September 21 Issuance at 3 & n.1.

1 deadline or to address the governing standard of "unavoidable and extreme circumstances,"[8] we would be justified in dismissing this case without further discussion. Nonetheless, so that there will be no lingering uncertainty about the validity of the arguments presented by NWC in support of its quest for additional time, we provide the following additional observations on the matters of the adequacy of staff preacceptance review of the BG&E application and staff postacceptance RAIs and status meetings with BG&E.

As the Commission has made clear, how thoroughly the staff conducts its preacceptance review process and whether its decision to accept an application for filing was correct are not matters of concern in this adjudicatory proceeding. See The Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 395-96 (1995); see also New England Power Co. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 280-81 (1978). Instead, the focus of this case is the adequacy of the application as it has been accepted and docketed for licensing review. See 10 C.F.R. § 2.714(b)(2)(iii). If there are deficiencies in that application, in its contentions a petitioner can specify what those are and, if the petitioner is correct such that the application is insufficient to support issuance of the requested license, then the application must be denied. Thus, any NWC concerns about the propriety of the staff's preacceptance review provide no basis for extending the time for filing its contentions.

---

[8]As the applicant points out, see BG&E Motion to Vacate Response at 2, pursuant to the terms of our initial prehearing order, such an extension request would have been due at least three business days before the filing deadline.

So too, the staff's postacceptance requests for additional information and meetings with BG&E to discuss the status of its application are not matters that give any cause for delaying the filing of NWC contentions. The agency's licensing review procedures, including 10 C.F.R. § 2.102, contemplate an ongoing process in which the application may be modified or improved. See Curators, 41 NRC at 395; New England Power, 7 NRC at 281. Staff RAIs directed to the applicant and staff/applicant status meetings are well-established parts of that dynamic process. Yet, as section 2.714 makes clear, the application as docketed, not staff RAIs and status meetings, remain the focal point for any contentions. Concomitantly, the availability of the application, not ongoing staff and applicant license review related-activities, is the central concern relative to setting a deadline for filing contentions. See Private Fuel Storage, 47 NRC at 160 (delay in filing contentions relating to security plan portion of application granted because of need to issue protective order to grant petitioner access to security plan).

This is not to say that staff RAIs, applicant RAI responses, and staff/applicant status meetings are irrelevant to the adjudicatory process. For example, if a petitioner concludes that a staff RAI or an applicant RAI response raises a legitimate question about the adequacy of the application, the petitioner is free to posit that issue as a new or amended contention, subject to complying with the late-filing standards of section 2.714(a).[9] But as justification for

---

[10]In its October 1 communications motion, NWC expresses concern about the amount of time it takes Calvert Cliffs license renewal-related documents, including meeting notices, to become available in the agency PDR. See Communications Motion at 1-2. Although the staff notes that Calvert Cliffs meeting notices are available on the agency's Internet web site and states it has acted to put NWC on its distribution list for staff renewal application-related

delaying (or ignoring) a contention filing deadline, the pendency or possibility of staff RAIs or status meetings provides no exceptional cause.

III. CONCLUSION

Petitioner NWC has failed to establish cause for extending the October 1, 1998 contentions filing deadline. NWC also has failed to (1) submit any contentions on or before that filing date, and (2) establish that the two contentions it filed on October 13, 1998, meet the standards for late-filing set forth in 10 C.F.R. § 2.714(a). We must, therefore, deny its intervention petition/hearing request and dismiss this proceeding for want of any admissible contentions.[10]

For the foregoing reasons, it is this sixteenth day of October 1998, ORDERED, that:

1. The August 7, 1998 intervention petition/hearing request of petitioner National Whistleblower Center is denied and this proceeding is terminated.

2. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as it rules on an intervention petition, this memorandum and order may be appealed to the Commission

---

correspondence to BG&E and staff/applicant meeting notices, see Staff Status Report/Communications Motion Response at 7-8, relative to the timeliness of contentions it seems apparent that the delay about which NWC complains arguably would be a factor it could invoke in justifying any late-filed contention based on information from such documents or meetings.

[11] Because dismissal of this case is appropriate based on NWC's failure to provide any admissible contentions, we need not reach the issue of the standing to intervene of NWC or the individuals whose interests it purportedly represents.

within ten days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD[11]

Original Signed By
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Original Signed By
Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Original Signed By
Thomas D. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 16, 1998

---

[11] Copies of this memorandum and order were sent this date to counsel for the applicant BG&E, petitioner NWC, and the staff by Internet e-mail transmission.

IN THE MATTER OF
BALTIMORE GAS & ELECTRIC COMPANY
(CALVERT CLIFFS NUCLEAR POWER PLANT,
UNITS 1 AND 2)

Nuclear Regulatory Commission

CLI-98-19
Docket Nos. 50-317-LR, 50-318-LR

September 17, 1998

COMMISSIONERS: Shirley Ann Jackson, Chairman; Nils J. Diaz; Edward McGaffigan, Jr.

MEMORANDUM AND ORDER

This proceeding involves an application by Baltimore Gas & Electric Company ("BG & E") to renew its operating license for both units of its Calvert Cliffs Nuclear Power Plant--an action opposed by the National Whistleblower Center ("NWC"). On August 19, 1998, the Commission issued CLI-98-14, 48 NRC 39, referring NWC's petition for intervention and hearing to the Atomic Safety and Licensing Board and setting out a suggested expedited procedural schedule for the case. On August 20th, the Board issued a Memorandum and Order (unpublished) scheduling further filings in this proceeding. In that order, the Board established a September 11th deadline for the filing of contentions (slip op. at 3). On August 21st, NWC asked the Board for an enlargement of time until December 1st within which to file its contentions. On August 27th, the Licensing Board issued an order (unpublished) denying NWC's request. NWC failed to submit contentions by September 11th. Instead, it filed

with the Commission a petition for review of the Board's August 27th order.

We ordinarily do not review interlocutory Board orders denying extensions of time, but we do so here as an exercise of our general supervisory jurisdiction over agency adjudications. On consideration of NWC's petition for review, we conclude that at the time it requested a hearing in early August, it might not have anticipated that the Board would set a date as early as September 11th as the deadline for filing contentions, perhaps in part because the agency's Notice of an Opportunity for a Hearing stated, somewhat ambiguously, that a petitioner had to file contentions "not later than" 15 days prior to the first prehearing conference (63 Fed.Reg. 36,966 (July 8, 1998)). In addition, NWC has represented that its experts were unable to complete their review of the Calvert Cliffs application by the September 11th deadline. To ensure that NWC has an adequate opportunity to introduce matters of safety or environmental concern into the Calvert Cliffs proceeding, we have decided to grant NWC until September 30th to file contentions. However, NWC's contentions, to be admissible, must satisfy the Commission's standards for acceptability of contentions set forth in 10 C.F.R. § 2.714 and, after September 30th, our late- filed criteria will come into play. The Board should be prepared to terminate the adjudication promptly should NWC submit no admissible contentions.[1]

---

[1]We note that, by September 30th, NWC will have had 134 days since the NRC published its May 19, 1998 notice of acceptance for docketing of BG & E's application (63 Fed.Reg. 27,601), 112 days since the NRC announced the beginning of the public scoping process under the National Environmental Policy Act (63 Fed.Reg. 31,813 (June 10, 1998)), and 84 days since the NRC published the Notice of Opportunity for

We recognize that our grant of an extension of time to NWC may require the Board to postpone, by two weeks or so, the issuance of its initial decision on standing and on the admissibility of contentions. Given the threshold stage of this proceeding, however, this short delay will not compromise the Commission's ultimate goal to resolve all license renewal issues within 30 months of our initial hearing notice.

Our decision today to relax the Board's September 11 deadline by no means suggests any dissatisfaction with the Board's handling of the matter. The Board acted entirely reasonably both in establishing the September 11 deadline and, in the absence of Commission guidance, in refusing to extend it, particularly in refusing to extend it until November, as NWC originally requested. We urge the Board to continue its effort to move this proceeding forward expeditiously. Our decision today also reflects no agreement with NWC's position that the Commission's initial decision to expedite this case and to provide the Board scheduling milestones is somehow unlawful. We recently set out the Commission's views on these matters in CLI-98-15, 48 NRC 45 (1998), and reaffirm them here. Finally, for the reasons given by the Board itself in its August 27th order, it possesses considerable authority to modify general deadlines set out in our rules and we expect it to continue to exercise that authority when appropriate.

For the foregoing reasons, we grant NWC's petition for review and give NWC additional time, until September 30, 1998, to file contentions in this proceeding.

Hearing (63 Fed.Reg. 36,966 (July 8, 1998)). Both the docketed application and detailed information about the license renewal process have been available publicly since at least the May 19th notice.

IT IS SO ORDERED.
For the Commission

JOHN C. HOYLE
Secretary of the Commission
Dated at Rockville, Maryland, this 17th day of September 1998.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Thomas D. Murphy

In the Matter of BALTIMORE GAS AND ELECTRIC COMPANY (Calvert Cliffs Nuclear Power Plant, Units 1 & 2)	Docket Nos. 50-317-LR 50-318-LR ASLBP No. 98-749-01-LR

August 27, 1998

MEMORANDUM AND ORDER
(Denying Time Extension Motion
and Scheduling Prehearing Conference)

By motion filed August 21, 1998, petitioner National Whistleblower Center (NWC) seeks revision of the Board's August 20, 1998 initial prehearing order as it (1) established

a September 11, 1998 deadline for filing any supplement to its intervention petition; and (2) proposed holding an initial prehearing conference the week of October 13, 1998. See Petitioner's Motion for Enlargement of Time (Aug. 21, 1998) [hereinafter NWC Extension Motion]. Petitioner seeks to move the prehearing conference back to at least December 1, 1998, and asserts its purported right, under 10 C.F.R. § 2.714(a)(3), to file petition supplements up to fifteen days prior to the initial prehearing conference. In submissions filed August 24 and August 26, 1998, respectively, applicant Baltimore Gas and Electric Company (BG&E) and the NRC staff oppose the NWC extension request.

For the reasons given below, we deny the motion. In addition, based on the responses from the participants relative to our proposed initial prehearing conference date, we establish a schedule for that prehearing conference.

I. NWC Extension Motion

Central to NWC's extension request is its asserted inability within the Board-established time frame to complete its efforts to retain "eminent experts" to review the BG&E license renewal application and have those experts provide it with the necessary technical input to frame its contentions. NWC Extension Motion at 1-2. Its unspoken premise for this argument is that for this and other agency licensing proceedings, the "starter's pistol" for application review and contention formulation does not sound until a petitioner's hearing request is filed. It is mistaken. As both BG&E and the staff point out, the application in question has been publically available since late April 1998, some four months ago, at which time the public, including NWC, was advised

that a hearing could be offered on the application. See 63 Fed. Reg. 20,663, 20,664 (1998). NWC has not made any showing as to why, in light of this extended period during which the BG&E application was available, it is unable to complete its contention composition efforts by the September 11 deadline. Thus, its expert review claim does not provide the requisite "unavoidable and extreme circumstances" that warrant an extension. CLI-98-14, 48 NRC __, __ (slip op. at 6) (Aug. 19, 1998).

As a basis for its extension request, NWC also proffers the "voluminous and complex" nature of the application and the fact this is the "first" power reactor license renewal proceeding. NWC Extension Motion at 3. The three-volume application, while not light reading, clearly has a much more limited scope compared to initial license applications for power reactors and other facilities. Moreover, while NWC has asserted repeatedly that its contentions will present complex and novel issues, neither its intervention petition nor its extension motion present a single example of what those would be. Again, we are unable to find that NWC has met its burden to establish the requisite "unavoidable and extreme circumstances" to warrant an extension.

Finally, we find no basis for NWC's assertion that section 2.714(a)(3) provides an absolute right to file contentions up to fifteen days before the initial prehearing conference. As the staff points out, this provision sets an automatic outside limit for the filing of contentions, but only in the absence of licensing board action in accordance with its 10 C.F.R. §§ 2.711(a), 2.718 authority to regulate the proceeding by, among other things, setting schedules. In this instance, exercising that recognized authority, see Houston Lighting and Power Co. (Allens Creek Nuclear Generating

Station, Unit 1), ALAB-574, 11 NRC 7, 12-13 (1980), consistent with the Commission's scheduling guidance we have established a deadline for filing intervention petition supplements that is not tied to the prehearing conference schedule. And, as we noted in our initial prehearing order, contentions submitted after that date will be considered late-filed.

II. Initial Prehearing Conference Schedule

In our initial prehearing order, we asked the parties to advise us "immediately" of any conflicts relative to conducting a prehearing conference the week of October 13, 1998. Licensing Board Memorandum and Order (Initial Prehearing Order) (Aug. 20, 1998) at 4 (unpublished). Taking into account the responses of counsel, we will convene a prehearing conference in this proceeding beginning at 9:30 a.m. on Thursday, October 15, 1998, in the Atomic Safety and Licensing Board Panel Hearing Room, Room T-3B45, Third Floor, Two White Flint North Building, 11545 Rockville Pike, Rockville, Maryland. Although the prehearing conference will continue until completed, the Board currently anticipates it should take no more than two days.

In this connection, we note that BG&E has suggested we consider the issue of petitioner's standing on a more expedited basis, separate from the question of contention admissibility. See [BG&E] Answer to Petition to Intervene and Request for Hearing of [NWC] (Aug. 24, 1998) at 11-12. Given the already expedited schedule in this proceeding, the efficiencies of this approach are not altogether apparent. Thus, at the prehearing conference we will entertain arguments on (1) the issue of standing, based on the

information in the petitioner's August 7, 1998 hearing request/intervention petition and any additional information NWC supplies in conjunction with its petition supplement; and (2) the admissibility of NWC's proffered contentions.

For the foregoing reasons, it is this twenty-seventh day of August 1998, ORDERED, that:

1. Petitioner NWC's August 21, 1998 motion for extension of time is denied.

2. An initial prehearing conference will be held in this proceeding in accordance with the provisions of section II above.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[1]

Original Signed By
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 27, 1998

---

[1] Copies of this memorandum and order were sent this date to counsel for applicant BG&E and to counsel for petitioner NWC by Internet e-mail transmission; and to counsel for the staff by e-mail through the agency's wide area network system.

IN THE MATTER OF
BALTIMORE GAS & ELECTRIC COMPANY
(Calvert Cliffs Nuclear Power Plant, Units 1 and 2)

Nuclear Regulatory Commission

CLI-98-15
Docket Nos. 50-317-LR, 50-318-LR

August 26, 1998

COMMISSIONERS: Shirley Ann Jackson, Chairman; Nils J. Diaz; Edward McGaffigan, Jr.

MEMORANDUM AND ORDER

This proceeding involves an application by Baltimore Gas & Electric Co. ("BG & E" or "Applicant") to renew its operating license for both units of its Calvert Cliffs Nuclear Power Plant in Lusby, MD. The National Whistleblower Center ("NWC" or "Petitioner"), wishing to oppose BG & E's application, filed a timely petition for intervention and hearing. On August 19, 1998, the Commission issued CLI-98-14, 48 NRC 39, referring to the Atomic Safety and Licensing Board NWC's petition for intervention and hearing, providing guidance for the conduct of the proceeding (assuming a hearing is granted), and setting out a suggested procedural schedule for the case. On August 24, 1998, NWC filed a motion to vacate portions of CLI-98-14 as contrary to the Commission's own regulations (10 C.F.R. §§ 2.711(a), 2.718(m), 2.740, 2.756), the Atomic Energy Act, 42 U.S.C. s 2231 ("AEA"), the Administrative Procedure Act, 5 U.S.C. ss 551-558 ("APA"), and Constitutional due process. For the reasons set forth below,

we deny NWC's motion.

The gist of NWC's complaint is that CLI-98-14 denies it " 'meaningful public participation' " in this proceeding. Motion at 14, *quoting Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1441 (D.C.Cir.1984). According to NWC, the Commission's order demonstrated alleged hostility towards NWC and the public adjudicatory process. Motion at 14. NWC asks the Commission to vacate the scheduling and guidance portions of CLI-98-14 and thereby to remove an alleged "chilling effect" on Petitioner's due process rights. Id. at 14-15.

CLI-98-14 derives not from hostility toward NWC but from the Commission's recognition that license renewal applications require a major commitment of resources and effort by the renewal applicant, the NRC Staff, the Commission itself, and any party opposed to renewal. Our order is designed to prevent unnecessary delays and digressions, but at the same time to ensure a fair and meaningful process. In our view, 30 months to resolve license renewal controversies, as proposed in CLI-98-14, on its face seems sufficient time for NWC to make its case (should a hearing be granted) and for the Board and the Commission to consider all arguments. To be sure, diligence and effort will be required, but that is true in litigation of any stripe, at least where deadlines govern. With this perspective in mind, we turn now to NWC's particular concerns.

NWC first objects to the Commission's "mandat[ory]" 30-month schedule as arbitrary, capricious, and an abuse of discretion. NWC considers the issuance of such a schedule premature, given that the Commission knows nothing of what contentions NWC will offer, what conclusions the NRC

Staff will reach in its Safety Evaluation Report ("SER") and Final Supplemental Environmental Impact Statement ("FSEIS"), and what factors may require extending this first-of-its- kind proceeding. Id. at 3, 5. According to NWC, the schedule will prevent Petitioner from protecting both its procedural and substantive rights and the Board from fulfilling its regulatorily imposed obligation to " 'regulate the course of the hearing' and 'dispose of procedural requests or similar matters.' " Id. at 4, quoting APA, 5 U.S.C. s 556(c). Moreover, given that the Commission did not seek input from the parties prior to issuing the schedule, NWC argues that the schedule violates the APA provision requiring agencies to manage their proceedings consistent with the " 'convenience and necessity of the parties.' " Motion at 4, 6, quoting APA, 5 U.S.C. s 554(b), and referring to 5 U.S.C. ss 556(c)(5), 557(d)(1)(E). Further, NWC contends that the schedule's timing milestones themselves are improper in that they preclude Petitioner from "properly participat[ing] in this proceeding." Motion at 5.

NWC's first line of argument reflects a basic misreading of CLI-98-14. That order did not impose an unalterable schedule, carved in stone, as Petitioner suggests. See, e.g., CLI-98-14, 48 NRC at 42 n. 1 (the Board still has the "discretion [to] allow the commencement of discovery against the Staff on safety issues if the final SER is issued before the [FSEIS] or on environmental issues if the [FSEIS] is issued before the final SER"); accord id. at 42. (For further discussion of the procedural flexibility reflected in CLI-98-14, see discussion of Petitioner's fifth argument, below.) Rather, CLI-98-14 was issued as "guidance" pursuant to the Commission's inherent supervisory authority to oversee the agency's own administrative adjudications, an authority that

perforce includes instructions to its Licensing Board.[1] Like other kinds of Commission guidance, our case-specific scheduling guidance is nonbinding by nature,[2] as the language of CLI-98-14 itself makes quite clear (again, see discussion of Petitioner's fifth argument, below).

The Commission exercises its inherent supervisory authority both by issuing generic policy statements on the conduct of licensing proceedings and by issuing orders to the Board offering guidance that is specific to particular cases. For instance, the Commission quite recently issued a Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998), 63 Fed.Reg. 41,872 (Aug. 5, 1998), setting forth guidance on a number of procedural issues. To a large degree, CLI-98-14 reflects the generic guidance we offered in that Policy Statement.[3]

---

[1]Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 332 (1998) (regarding Commission's "inherent supervisory authority" over the Presiding Officer); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 229 (1990) ("the Commission has inherent supervisory authority over adjudicatory proceedings"); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569 (1988) (same); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 234 (1986) (same); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977) (same).

[2]Cf. Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 98 (1995) ("NUREGs and Regulatory Guides, by their very nature, serve merely as guidance and cannot prescribe requirements").

[3]The Commission also issued a general policy statement on this general subject in 1981. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), 46 Fed.Reg. 28,533 (May 27,

Likewise, the Commission regularly issues case-specific guidance to the Board on both procedural and substantive issues. For instance, we not only offered both these kinds of guidance to a Licensing Board in the Yankee Rowe decommissioning proceeding, but also set out a proposed expedited schedule, just as we did in CLI-98-14. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1 (1996).[4] Such case-

---

1981).

[4]For further instances where the Commission offered guidance to its Licensing Boards, see Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35-37 (1998) (noting that the Commission monitors all adjudicatory proceedings and offering guidance on two substantive issues); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-19, 38 NRC 81 (1993) (providing guidance on substantive issue); Randall C. Orem, D.O., CLI-93-14, 37 NRC 423, 429-30 (1993) (offering guidance on policy matter); Geo-Tech Associates (Geo-Tech Laboratories), CLI- 92-14, 36 NRC 221, 222 (1992) (offering guidance regarding the scope of hearing held on enforcement sanctions imposed for failure to pay user fees); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 187-88 (1991) (providing guidance on the requirements for organizational standing); Curators of the University of Missouri, CLI-91-7, 33 NRC 295, 296-97 (1991) (providing guidance to the Board regarding implementation of section 2.1251(c) in initial decisions relating to Subpart L proceedings); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 237 (1991) (providing guidance regarding the admissibility of contentions); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61 (1991) (providing guidance to the parties regarding potential requests for NRC action to order operation of the Shoreham plant); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI- 91-1, 33 NRC 1 (1991) (providing guidance on the relationship of the "possession only" license and a decommissioning plan); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-11, 28 NRC 603, 603-04 (1988) (providing guidance as to the course of action to be followed if

specific guidance is fully appropriate for the reasons given more than 20 years ago in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977):

> While we may deal with matters before us in adjudicatory hearings only on the basis of the record which has been compiled, the [NRC] is not a court constrained to the "passive virtues" of judicial action.... We have a regulatory responsibility which includes the avoidance of unnecessary delay or excessive inquiry in our licensing proceedings.... Ultimately the members of the Commission are responsible for the actions and policy of this agency, and for that reason we have inherent authority to review and act upon any adjudicatory matter before a Commission Cf. Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 98 (1995) ("NUREGs and Regulatory Guides, by their very nature, serve merely as guidance and cannot prescribe requirements"). tribunal--subject only to the constraints of action on the record and reasoned explanation of the conclusions....

Pursuant to its inherent supervisory authority, the Commission over the years repeatedly has issued orders expediting Board proceedings and suggesting time frames and schedules. See, e.g., Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-3, 45 NRC 49, 50 (1997); Yankee, CLI-96-1, 43 NRC at 9-11; State of New

---

a problem is found with the scope of an emergency exercise). Cf. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-92-6, 35 NRC 86, 90 (1992) (announcing that, if the case developed in a particular direction, "the Commission will provide appropriate instructions and guidance for the conduct of further proceedings").

Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 291 (1993); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-9, 28 NRC 567, 569-71 (1988). Although the Commission expects such guidance to be followed to the maximum extent feasible, the Licensing Board may deviate from the proposed schedule when circumstances require--as CLI-98-14 itself suggests (48 NRC at 42-43, 44).

Commission orders expediting cases do not reflect inflexible or arbitrary action, but rather the Commission's best judgment on how to speed up the adjudicatory process without prejudicing anyone's rights to participate meaningfully. NWC's objections to the Commission's order ignore the Commission's express statements in CLI-98-14 that, although the Board should narrow the issues requiring discovery and limit the rounds of discovery, it should nevertheless ensure that these actions were "consistent with fairness to all parties" and that "[w]e do not expect the Licensing Board to sacrifice fairness and sound decisionmaking to expedite any hearing granted under this application." 48 NRC at 42-43.

NWC's second line of argument is that CLI-98-14 violates the Commission's own procedural rules. According to Petitioner, the Commission is bound to follow its own regulations and any deviation from these regulations constitutes a violation of law. More specifically, Petitioner complains that (1) the Commission's restriction of extensions of time to situations involving unavoidable and extreme circumstances violates 10 C.F.R. § 2.711(a) which provides that such restrictions may be imposed "for good cause"; (2) the 30- month period and the deadlines within that period

preclude a "fair and impartial" conduct of the hearing, as required in 10 C.F.R. § 2.718; (3) the schedule interferes with the authority of the Board under 10 C.F.R. § 2.718(e) to "regulate the course of the hearing and conduct of the parties" as well as the Board's obligation under 10 C.F.R. § 2.718(m) to act in accordance with the APA; and (4) the Commission's restrictions on discovery contravene 10 C.F.R. § 2.740(b) and (c) which purportedly grant such restricting authority only to the Board and which require the exercise of that authority to be preceded by a motion for such relief. Motion at 7-11.

This second line of argument runs afoul of the same well-established legal principles discussed above.[5] Contrary to NWC's view, the Commission has traditionally exercised plenary supervisory authority over its adjudications and adjudicatory boards. This authority allows it to interpret and customize its process for individual cases. See, e.g., Safety Light Corp. (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 91 (1992) (Commission exercises its authority to modify applicable procedural rules). Indeed, 10 C.F.R. § 2.711 explicitly provides that the Commission may extend or shorten the time for action set forth in the rules and may set time limits where the rules do not prescribe a limit. The Commission, as the agency's ultimate adjudicator, also has full authority to define the scope of its proceedings. In Geo-Tech Laboratories, CLI-92-14, 36 NRC at 222, the Commission limited the case's

---

[5]It is also not clear that CLI-98-14 departs from the Commission's procedural rules. For example, limiting extensions of time to situations involving unavoidable and extreme circumstances simply gives content, under the circumstances of this case, to our rule's general "good cause" standard.

scope for reasons similar to those applicable to the instant proceeding, i.e., a prior rulemaking had already resolved most of the issues that the licensee would probably raise:

> The hearing scope shall be quite narrow. Neither the fee schedule nor its underlying methodology may be properly challenged in this type of proceeding. They have been fixed by rulemaking which this proceeding cannot amend.... If a Board determines that a hearing of substantially broader scope is warranted, it must receive authorization from the Commission before proceeding further.

Cf. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 NRC 269, 271 (1991) (directing the Licensing Board to suspend consideration of all but two issues), reconsideration denied, CLI-92-6, 35 NRC 86 (1992).

Third, NWC asserts that the Commission's limitation of the proceeding "to a review of the plant structures and components that will require an aging management review for the period of extended operation of the plant's systems, structures, and components" violates the provisions of 10 C.F.R. § 2.714. According to NWC, that regulation gives Petitioners "the right to file any contentions which they determine, in good faith, to be related to Applicant's renewal process." Motion at 11-12 (emphasis added), referring to CLI-98-14, 48 NRC at 41.

In CLI-98-14, the Commission merely reiterated a decision on the scope of the license renewal inquiry that it had made 3 years ago when promulgating Part 54 of its regulations. See 60 Fed.Reg. 22,461 (May 8, 1995). See

generally Geo-Tech Laboratories, CLI-92-14, 36 NRC at 222. In the Part 54 rulemaking, the Commission determined that the scope of the relicensing proceedings would be limited in precisely the manner set forth in CLI-98-14. Indeed, CLI-98-14 even cited the regulations governing the scope of such proceedings--10 C.F.R. § 54.21(a) and (c). 48 NRC at 41.[6] Moreover, although Petitioner is entitled to file any contention that it believes is germane to the requested licensing action, it is not entitled to have each of those contentions admitted for litigation. The Commission in CLI-98-14 was appropriately indicating the proper scope of the proceeding, thereby saving the time and resources of the Board, Licensee, Staff, and Petitioner. *See* Perry and Geo-Tech Laboratories, *supra*. *See generally Bellotti v. NRC*, 725 F.2d 1380, 1381-82 (D.C.Cir.1983).

Fourth, Petitioner complains that the Commission has established a new standard for the Board's raising of issues sua sponte, i.e., that they be raised by the Board itself only in "extraordinary" circumstances and that such issues must present "serious safety, environmental, or common defense and security matters" in order to be admissible. NWC asserts that any matter material to public health and safety is admissible as a contention. It further argues that the procedures of CLI-98-14 will have a "chilling effect" on the Board's willingness to initiate a contention sua sponte. Motion at 12-13, referring to CLI-98-14, 48 NRC at 41. Again, we disagree. The extent of the Board's authority to raise contentions sua sponte is a matter within the Commission's supervisory authority, and depends largely on an appropriate division of authority between the Board and

---

[6]To the extent that Petitioner is attempting to attack the regulations directly, it is precluded from doing so under 10 C.F.R. § 2.758.

the agency's regulatory staff--a question of resources and expertise peculiarly within the Commission's province to decide.[7]

Fifth and finally, NWC argues that, to the extent CLI-98-14 is an advisory opinion, it is improper and should be vacated. Oddly, Petitioner's supporting arguments all focus on the purportedly mandatory nature of the Commission's order. Motion at 13-14. As noted above, although the order is an expression of the Commission's inherent supervisory authority over the Board, its scheduling provisions constitute guidance rather than a mandate to the Board. The language on which NWC itself relies makes this clear: "The Commission directs the Licensing Board to set a schedule for any hearing granted in this proceeding that establishes as a goal the issuance of a Commission decision on the pending application in about 2 1/2 years from the date that the application was received."

"[T]he Licensing Board [should] conduct this proceeding in accordance with the guidance specified in this order." 48 NRC at 42, 44 (emphases added). See also id. at 40 ("We also provide the Licensing Board with guidance .... and a suggested schedule") and 42 ("proposed schedule"; "the goal of issuing a decision... in about 2 1/2 years") (emphases added). Again, while we expect the Board to adhere to our scheduling guidance to the maximum extent possible, we recognize that particular circumstances may justify

---

[7]Moreover, the sua sponte review standards to which Petitioner objects mirror the language in 10 C.F.R. § 2.760a, applicable to proceedings on facility operating license applications. See also Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109, 110-11 (1982).

deviations from our guidance (see id. at 43, 44). Consequently, we have refrained from mandating a schedule.

Similarly, as previously noted, the Commission in CLI-98-14 provided that, although the Board should narrow the issues requiring discovery and limit the rounds of discovery, it should nevertheless ensure that these actions were "consistent with fairness to all parties" and later stated that "[w]e do not expect the Licensing Board to sacrifice fairness and sound decisionmaking to expedite any hearing granted under this application." CLI-98-14, 48 NRC at 42- 43. Likewise, the Commission provided that the Board still has the "discretion [to] allow the commencement of discovery against the Staff on safety issues if the final SER is issued before the [FSEIS] or on environmental issues if the [FSEIS] is issued before the final SER"). 48 NRC at 42 n. 1. Accord id. at 42. None of the words quoted above suggests that the provisions of CLI-98-14 were, as Petitioner suggests, carved indelibly in stone. Unforeseen circumstances, or unexpected complexity, may require adjustments in the expected course of the proceeding. CLI-98-14 contains sufficient flexibility to deal with such situations.

For all the reasons set forth above, we conclude that Petitioner is in no way being denied "meaningful public participation" in this proceeding. We therefore deny NWC's motion to vacate.

It is SO ORDERED.
For the Commission

JOHN C. HOYLE
Secretary of the Commission
Dated at Rockville, Maryland, this 26th day of August 1998.

IN THE MATTER OF
BALTIMORE GAS & ELECTRIC COMPANY
(Calvert Cliffs Nuclear Power Plant, Unit 1 and 2)

Nuclear Regulatory Commission

CLI-98-XX

Docket Nos. 50-317-LR, 50-318-LR

August 19, 1998

ORDER REFERRING PETITION FOR INTERVENTION AND REQUEST FOR HEARING TO ATOMIC SAFETY AND LICENSING BOARD PANEL

I. Introduction

On April 10, 1998, Baltimore Gas & Electric Company (Applicant) submitted an application to renew the operating licenses for its Calvert Cliffs Nuclear Power Plant Units 1 and 2, located in Lusby, Maryland. The notice of receipt of application was published in the *Federal Register* on April 27, 1998. *Baltimore Gas & Electric Company; Calvert Cliffs Nuclear Power Plant Units 1 & 2; Notice of Receipt of Application for Renewal of Facility Operating Licenses Nos. DPR-53 and DPR-69 for an Additional 20-Year Period*, 63 Fed. Reg. 20,663 (1998). A notice of acceptance for docketing of the application for renewal of the facility operating licenses was published in the *Federal Register* on May 19, 1998. *Baltimore Gas & Electric Company; Calvert Cliffs Nuclear Power Plant Units 1 and 2; Notice of Acceptance for Docketing of the Application for Renewal of Facility Operating Licenses Nos. DPR-53 and*

DPR-69 for an Additional 20-Year Period, 63 Fed. Reg. 27,601 (1998). On July 8, 1998, the staff of the Nuclear Regulatory Commission (Staff) issued a *Notice of Opportunity for a Hearing*. 63 Fed. Reg. 36,966 (1998).

On August 7, 1998, the National Whistleblower Center filed a "Petition to Intervene and Request for Hearing of the National Whistleblower Center" (Petition) in accordance with 10 C.F.R. § 2.714. This Order refers the Petition to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for assignment of an Atomic Safety and Licensing Board to rule on this and any additional requests for a hearing and petitions for leave to intervene and, if a hearing is granted, to conduct the proceeding. We also provide the Licensing Board with guidance for the conduct of any proceeding if a hearing is granted, and a suggested schedule for any such proceeding.

II. Commission Guidance

A. Scope of Proceeding

The scope of this proceeding is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), 54.4; *Nuclear Power Plant License Renewal; Revisions, Final Rule*, 60 Fed. Reg. 22,461 (1995). In addition, review of environmental issues is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). *See* NUREG-1437, "Generic Environmental Impact Statement (GEIS) for License Renewal of Plant;" *Environmental Review for Renewal of Nuclear Power Plant Operating*

Licenses, Final Rule, 61 Fed. Reg. 28,467 (1996), *amended by* 61 Fed. Reg. 66,537 (1996). The Licensing Board shall be guided by these regulations in determining whether proffered contentions meet the standard in 10 C.F.R. § 2.714(b)(2)(iii). It is the responsibility of the petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of this proceeding. If rulings on the admission of contentions or the admitted contentions themselves raise novel legal or policy questions, the Licensing Board should readily refer or certify such rulings or questions to the Commission on an interlocutory basis. The Commission itself is amenable to such early involvement and will evaluate any matter put before it to ensure that substantive interlocutory review is warranted.

The Commission expects that matters within the scope of this proceeding but not put into controversy will be considered by the Licensing Board only where the Licensing Board finds that a serious safety, environmental, or common defense and security matter exists. Such consideration should be exercised only in extraordinary circumstances. If the Licensing Board decides to raise a matter on its own initiative, a copy of its ruling, setting forth in general terms its reasons, must be transmitted to the Commission and General Counsel. The Licensing Board should not proceed to consider such *sua sponte* issues unless the Commission approves the Licensing Board's proposal to do so.

B. Discovery Management

Similar to the practice under current Rule 26 of the Federal Rules of Civil Procedure, if a hearing is granted, the Licensing Board should order the parties to provide certain

information to the other parties without waiting for discovery requests. This information will include the names and addresses of individuals likely to have discoverable information relevant to the admitted contentions, the names of individuals likely to be witnesses in this proceeding, the identification and production of documents (not already publicly available) that will likely contain discoverable information, and any other information relevant to the admitted contentions which the Licensing Board may require in its discretion.

Within 30 days of any Licensing Board order granting a request for a hearing, the Staff shall file in the docket, present to the Licensing Board, and make available a case file to the applicant and any other party to the proceeding. The Staff will have a continuing obligation to keep the case file up to date, as documents become available. The case file will consist of the application and any amendments thereto, the Final Environmental Impact Statement (in the form of a plant-specific supplement to the GEIS), any Staff safety evaluation reports relevant to the application, and any correspondence between the applicant and the NRC that is relevant to the application. Formal discovery against the Staff, pursuant to 10 C.F.R. §§ 2.720(h), 2.740, 2.742, and 2.744, regarding the Safety Evaluation Report (SER) and the Final Supplemental Environmental Impact Statement (FES) will be suspended until after issuance of these documents.[1]

---

[1]The above discussion is based on the Staff's review schedule for the BG&E application, which indicates that the final SER and FES will be issued fairly close in time. If this is not the case, the Board, in its discretion, may allow the commencement of discovery against the Staff on safety issues if the final SER is issued before the FES or on environmental issues if the FES is issued before the final SER.

The Licensing Board, consistent with fairness to all parties, should narrow the issues requiring discovery and limit discovery to no more than one round each for original and late-filed contentions.

C. Proposed Schedule

The Commission directs the Licensing Board to set a schedule for any hearing granted in this proceeding that establishes as a goal the issuance of a Commission decision on the pending application in about two and one half years from the date that the application was received. In addition, if the Licensing Board grants a hearing, once the Licensing Board has ruled on any petition for intervention and request for a hearing, formal discovery against the Staff should be suspended until after the Staff completes its final SER and FES, subject to the discretion of the Licensing Board to proceed with discovery on either the FES or final SER as discussed in footnote 1, above. The evidentiary hearing should not commence until after completion of the final SER and FES.

The Commission believes that the goal of issuing a decision on the pending application in about two and one half years may be reasonably achieved under the current rules of practice and the enhancements directed by this order and by our understanding of the Staff's current schedule for review of the application. We do not expect the Licensing Board to sacrifice fairness and sound decision-making to expedite any hearing granted on this application. We do expect, however, the Licensing Board to use the techniques specified in this order and in the Commission's policy statement on the conduct of adjudicatory proceedings to ensure prompt and efficient resolution of contested issues. *See Statement of*

Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 44 NRC ___ (1998). *See also Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981).

If a hearing is granted, in developing a schedule, the Licensing Board should adopt the following milestones for conclusion of significant steps in the adjudicatory proceeding:

- Within 90 days of the date of this order: Decision on intervention petitions and contentions. Start of discovery on admitted contentions, except against the Staff
- Within 30 days of the issuance of SER and FES: Completion of discovery against the Staff on admitted contentions. Late-filed contentions to be filed
- Within 40 days of the issuance of SER and FES: Responses to late-filed contentions to be filed
- Within 50 days of the issuance of SER and FES: ASLB decision on late-filed contentions
- Within 80 days of the issuance of SER and FES: Completion of discovery on late-filed contentions
- Within 90 days of the issuance of SER and FES: Pre-filed testimony to be submitted
- Within 125 days of the issuance of SER and FES: Completion of evidentiary hearing
- Within 220 days of the issuance of SER and FES: ASLB initial decision on application

To meet these milestones, the Licensing Board should direct the participants to serve all filings by electronic mail (in order to be considered timely, such filings must be received by the Licensing Board and parties no later than

midnight Eastern Time on the date due, unless otherwise designated by the Licensing Board), followed by conforming hard copies that may be sent by regular mail. If participants do not have access to electronic mail, the Licensing Board should adopt other expedited methods of service, such as express mail, which would ensure receipt on the due date ("in-hand"). If pleadings are filed by electronic mail, or other expedited methods of service which would ensure receipt on the due date, the additional period provided in our regulations for responding to filings served by first-class mail or express delivery shall not be applicable. *See* 10 C.F.R. § 2.710. In addition, to avoid unnecessary delays in the proceeding, the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances. The Licensing Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.749, unless the Licensing Board finds that such motions are likely to substantially narrow the issues for which an evidentiary hearing is necessary or will otherwise expedite the proceeding. Unless otherwise justified, the Licensing Board shall provide for the simultaneous filing of answers to proposed contentions, responsive pleadings, proposed findings of fact, and other similar submittals.

In addition, parties are obligated in their filings before the Licensing Board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

If a hearing is granted on this application, the Commission directs the Licensing Board to promptly inform

the Commission, in writing, if the Licensing Board determines that any single milestone could be missed by more than 30 days. The Licensing Board should include an explanation of why the milestone cannot be met and the measures the Licensing Board will take to mitigate the failure to achieve the milestone and restore the proceeding to the overall schedule.

III. Conclusion

The Commission directs the Licensing Board to conduct this proceeding in accordance with the guidance specified in this order. As in any proceeding, the Commission retains its inherent supervisory authority over the proceeding to provide additional guidance to the Licensing Board and participants and to resolve any matter in controversy itself.

It is so ORDERED.

For the Commission

John C. Hoyle
Secretary of the Commission
Dated at Rockville, Maryland this 19th day of August 1998.

United States Court of Appeals
For the District of Columbia Circuit

No. 99-1002 September Term, 1999

National Whistleblower Center Filed On: June 15, 2000
Petitioner

v.

Nuclear Regulatory Commission
United States of America,
Respondents

Baltimore Gas and Electric Company,
Intervenor

Consolidated with 99-1043

Before: Edwards, Chief Judge, Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed May 25, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner,
Deputy Clerk

United States Code
TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 23 - DEVELOPMENT AND CONTROL OF ATOMIC ENERGY
§ 2239. (a)(1)(A) Hearings and judicial review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections[1] 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an

---

[1] So in original. Probably should be "section".

amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

United States Code
TITLE 5-GOVERNMENT ORGANIZATION AND EMPLOYEES
CHAPTER 5 - ADMINISTRATIVE PROCEDURE
§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved -

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of -

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which

---

[1] So in original.

the hearing is to be held; and

(3) the matters of fact and law asserted. When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for-

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not -

(1) consult a person or party on a fact in issue, unless

on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply -

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising
the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

United States Code
TITLE 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES
CHAPTER 5 - ADMINISTRATIVE PROCEDURE
§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given -

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements. When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does

not expire until the application has been finally determined by the agency.

10 CFR Part 2 – RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS

§2.711 Extension and reduction of time limits.

(a) Except as otherwise provided by law, whenever an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may for good cause be extended or shortened by the Commission or the presiding officer, or by stipulation approved by the Commission or the presiding officer.

(b) In any instance in which this part does not prescribe a time limit for an action to be taken in the proceeding, the Commission or the presiding officer may set a time limit for that action.

10 CFR Part 2 – RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS

§2.714 (a) - (c) Intervention.

(a)(1) Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene. In a proceeding noticed pursuant to § 2.105, any person whose interest may be affected may also request a hearing. The petition and/or request shall be filed not later than the time specified in the notice of hearing, or as provided by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, or as provided in § 2.102(d)(3). Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d)(1) of this section:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

(a)(2) The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

(a)(3) Any person who has filed a petition for leave to intervene or who has been admitted as a party pursuant to this section may amend his petition for leave to intervene. A petition may be amended without prior approval of the presiding officer at any time up to fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a, or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference. After this time a petition may be amended only with approval of the presiding officer, based on a balancing of the factors specified in paragraph (a)(1) of this section. Such an amended petition for leave to intervene must satisfy the requirements of this paragraph (a) of this section pertaining to specificity.

(b)(1) Not later than fifteen (15) days prior to the holding of

the special prehearing conference pursuant to § 2.751a, or if no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his or her petition to intervene that must include a list of the contentions which petitioner seeks to have litigated in the hearing. A petitioner who fails to file a supplement that satisfies the requirements of paragraph (b)(2) of this section with respect to at least one contention will not be permitted to participate as a party. Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section.

(b)(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii)

of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

(c) Any party to a proceeding may file an answer to a petition for leave to intervene or a supplement thereto within ten (10) days after service of the petition or supplement, with particular attention to the factors set forth in paragraph (d)(1) of this section. The staff may file such an answer within fifteen (15) days after service of the petition or supplement.

January 13, 1989

MEMORANDUM FOR: Victor Stello
Executive Director for Operations

FROM: William C. Parler
General Counsel

SUBJECT: OGC ANALYSES OF LEGAL ISSUES RELATING TO NUCLEAR POWER PLANT LIFE EXTENSION

The Office of the General Counsel has prepared three memoranda (enclosed) which identify and analyze the important legal issues relating to applications to extend the operating life of nuclear power plants beyond the original forty-year term of the initial operating licenses.

Based upon the Atomic Energy Act of 1954 and the relevant legislative history, we determined that life extension should be accomplished through the grant of renewed (new) operating licenses rather then through amendment of existing operating licenses to extend the expiration date. We also conclude that an opportunity for a formal adjudicatory hearing to resolve issues-in-controversy should be provided in conjunction with an application for license renewal. These and other procedural topics are discussed in the memorandum entitled, "Procedural Issues Relating to Nuclear Power Plant License Renewal." The life extension rulemaking should address each of the procedural subjects

discussed in our memorandum. We emphasize that whether (and under what conditions) nuclear power plants may be safely operated beyond the original forty year license term is a scientific and engineering determination which should be made without regard to the purely legal question of the form of the license. The scope and criteria for staff review of life extension requests, and the scope of requested life extension hearings, is unaffected by whether the application or proceeding is for an "amendment", a "renewal license", or something else. The life extension rulemaking should specify the technical requirements and standards which must be met by each application for license renewal. Otherwise, the review and proceeding will be open ended.

As discussed in the memorandum "Need for Antitrust Review at Nuclear Power Plant License Extension," no antitrust review by the Attorney General is required at the time of license renewal.

With regard to environmental issues in our memorandum, "Need for EIS/EA in Support of Nuclear Power Plant License Renewal Rulemaking," we conclude that either: a) an environmental assessment (EA) followed by either a finding of no significant impact or by an environmental impact statement (EIS), as appropriate; or (b) an (EIS) must be prepared to support the life extension rulemaking. Such an EA or EIS could be expanded to cover generic environmental impacts (i.e. those which are common to all or a majority of sites) thereby eliminating, or reducing the scope of required site-specific environmental analyses.

Enclosures:
As stated

William C. Parler
General Counsel

PROCEDURAL ISSUES RELATING TO NUCLEAR POWER PLANT LICENCE RENEWAL

I. INTRODUCTION

The NRC's decision to assess whether and under what conditions nuclear power plants should be permitted to operate beyond forty years raises a number of procedural issues. Perhaps the most salient of these issues is the nature of the license for life extension, viz., whether a renewed operating license should be issued, or whether the existing license should be amended to extend the expiration date. Other procedural topics include the nature and timing of hearings, the earliest and latest dates for filing extension applications, the earliest date that the NRC can approve an application, and the length of a renewed license. The analysis of these issues is complicated by the fact that nuclear power plants have been licensed under both Section 103 and Section 104b of the Atomic Energy Act of 1954 (AEA).

After reviewing the AEA, its legislative history, as well as relevant case law, it is our view that life extension should be accomplished through the grant of renewed operating licenses, rather than through amendment of existing operating licenses to extend the expiration date, regardless of whether the existing operating licenses were issued pursuant to Section 103 or Section 104b.

We wish to emphasize that the form of the license with respect to life extension does not affect the substantive issues raised by life extension, viz., whether and under what

technical conditions/ restrictions/prerequisites should life extension be permitted for nuclear power plants. It cannot be stressed too strongly that the determination whether nuclear power plants may be safely operated beyond the original 40 year term of a license is a scientific and engineering determination. More importantly, this

determination should be made without regard to the purely legal question of the form of the license.

An opportunity for prior hearing is generally required in connection with the grant of a renewed license. However, one potentially negative impact of a hearing on the timeliness of the licensing process is dissipated by Section 9b of the Administrative Procedure Act, 5 USC 551-559 (APA) and 10 CFR 2.109, which permit a licensee with an operating license to continue operation of its facility until final agency determination of the renewal request, if the renewal request is timely filed. It is also our position that any hearings which may be held to resolve any issues- in- controversy should probably be formal adjudicatory hearings. These and other matters are discussed in more detail below.

II. DISCUSSION

A. FORM OF LICENSE

* * *

B. HEARINGS

1. Necessity for Hearings

Section 189 of the AEA is the only section of the AEA dealing with hearing rights. Hence, if there is a right to hearing under the AEA, it must be found in that section. Section 189a (l) states:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c or 188, the Commission shall grant a hearing upon request of any person whose interest may be affected by the proceeding, and shall admit that person as a party to such proceeding.

Section 189 was drafted "with precision and specificity." Deukmejian, 751 F.2d at 1312 (D.C. Cir. 1984) . As recounted by the Court in Deukmejian, the original bills to amend the Atomic Energy Act of 1946 did not explicitly require any hearings, but merely indicated that the provisions of the APA "shall apply" to all agency actions. See Section 181 of H.R. 8862 and S.1323, reprinted in 1 Legislative History at 161-62 and 237-38, respectively. In hearings before the Joint Committee, several witnesses suggested that

the legislation explicitly confirm a right to hearing.[9]

Subsequently, in the substitute House bill, H.R. 9757, and the substitute Senate bill, S. 3690. Section 181 was revised to provide that "the Commission shall grant a hearing to any party materially interested in any 'agency action.'" H.R. 9757, pp.84-85, S. 3690, pp.84-85, reprinted in 1 Legislative History at 624-25, 728-29.

Subsequently, the revised Section 181 was criticized by Senator Pastore as being "too broad, broader than it was intended to [be]." Senator Hickelooper, agreeing with Sen. Pastore, proposed a "corrective amendment which clarifies the situation." 100 Cong. Rec. 10,171 (July 16, 1954), reprinted in 2 Legislative History at 3175. Senator Hickelooper further explained the purpose of the amendment as follows:

> Mr. President, this section incorporates the provisions for hearings formerly part of section 181 but clearly specifies the types of Commission activities in which a hearing is to be required. The purpose of this revision is to specify clearly the

---

[9] See Hearings at 58, 64-65 (supplementary statement of E. Blythe Stason, Dean, University of Michigan Law School), 152-53 (supplemental written statement of Joseph Volpe, Volpe, Boesky and Skallerup, 348-49, 353 (supplementary written statement of F. K. McCune, General Manager, Atomic products Div., General Electric Co.), 416-17 (supplementary statement of the Special Committee on Atomic Power, Association of the Bar of the City of New York), reprinted in Legislative History at 1692, 1698-99, 1786, 87, 1982-83, 2077-78.

> circumstances in which hearings are to be held. The section also reincorporates the former provisions of section 189 dealing with judicial review. There is a slight change in wording merely to clarify the intent of Congress with respect to the extent of the applicability of the act of December 29, 1950 and the applicability of section 1 of the Administrative Procedure Act. (Emphasis added).

Id. The amendment created a new subsection (a) in Section 189.

Amending an operating license to extend the expiration date will clearly require an opportunity for hearing, since Section 189a specifically indicates that an opportunity for hearing must be provided in any proceeding to "amend" a license. This is true regardless of whether the operating license to be amended was issued under Section 103 or Section 104b.

However, whether the NRC is required by Section 189 to provide an opportunity for hearing if it issues a renewed Section 103 or Section 104b operating license is a different question. Beginning with the plain words of Section 189, we note that the term, "renewal" is not used in connection with the requirement for an opportunity for hearing.

The critical question therefore is whether a proceeding for the grant of a "renewed license" is nevertheless a "proceeding for the granting . . . . of any license" within the means of Section 189a. After all, an entirely plausible reason for the lack of specific reference to "renewals" in

section 189a is that Congress must have understood that a "renewal license" is still a "license" and therefore already covered by the statutory language. Moreover, as a conceptual matter, once a license expires, it normally ceases to have any further legal life or validity. If a "renewed" license is subsequently issued, it probably should be viewed as the "grant" of a new operating license for which an opportunity for hearing is provided under Section 189a(l). Another argument, in favor of providing an opportunity for hearing is that a contrary determination results in the anomalous situation whereby an opportunity for hearing is provided for less - important administrative actions (e.g., amendment), but is denied in the mote significant action of license renewal. We therefore conclude that section 189a provides an opportunity for hearing regardless of whether the extension is accomplished by renewal license or amendment.

Section 9b of the Administrative Procedure Act (APA), 5 USC 558, which permits continued operation if a timely renewal application has been filed, should also be applicable whether the extension is accomplished by renewal or amendment. Section 558 provides, in pertinent part:

> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

10 CFR 2.109 sets the date for timely filing at thirty

days before the expiration of the existing license:[10]

> If, at least thirty (30) days prior to the expiration of an existing license authorizing any activity of a continuing nature, a licensee files an application for a renewal or for a new license for the activity so authorized, the existing license will not be deemed to have expired until the application has been finally determined.

Since a licensee who timely files a renewal application has the right to operate at least until any necessary hearing has concluded and a final agency decision has been reached,[11] the uncertainty and adverse financial impact on the licensee that would occur if it had to shutdown its facility and await a final decision on its renewal application may be avoided. Thus, little practical advantage would be gained by not

---

[10] Whether the thirty day timeliness cutoff is sufficient in the context of license renewal is discussed further in Section C.1 below.

[11] Final agency action with respect to contested issues occurs 45 days after the issuance of an initial decision by the Atomic Safety and Licensing Board, unless an appeal is taken in accordance with 10 CFR 2.762 or the Commission directs that the initial decision be certified to it for issuance of a final decision in accordance with 10 CFR 2.770, 10 CFR 2.760(a). However, because the Director of NRC is responsible for resolving all uncontested issues and issuing the license, see 10 CFR 2.760(a), final agency action with respect to a renewal application does not occur until the Director either grants the renewal application, or issues a decision denying the application.

holding a public hearing.[12]

1. Formal v. Informal Hearings

If a hearing on a license renewal application is to be held, it remains to be determined whether that hearing to resolve contested issues should be a formal "on the record" hearing or an informal hearing. We believe that the better view is to require any necessary hearing be a formal one conducted in accordance with the "on the record" hearing requirements of the Atomic Energy Act.

Licensing is an "adjudication" under the APA. [13] However,

---

[12] We do note that if it were possible to extend the term of a 104b license by amendment effective prior to the conclusion of a requested hearing under the "Sholly" provisions of Section 189, the utility might gain some financial or public relations advantage in being able to state that the extension had been granted by NRC "subject to" the later hearing. However, under the Commission's Congressionally endorsed Sholly guidelines, the grant. of a life extension would likely induce a "significant hazards consideration", and this precludes issuance of the amendment prior to a requested hearing. 10 CFR 50.91; 51 Fed. Reg. 7744 (March 6, 1986).

[13] An "adjudication" is defined under the APA as the "agency process for the formulation of an order." APA, Section 2(d), 5 USC 551 (7). An "order", in turn is defined as "the whole or part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than a rule but including license." APA, Section 2(d). 5 USC 551 (6). "Licensing" is the agency process "respecting the grant, renewal, denial, revocation, suspension, annulment., withdrawal, limitation, amendment, modification or conditioning of a license." See also Citizens for a Safe Environment v. AEC, 489 F.2d 1018, 1021 (3rd Cir. 1974), citing Siegal v. AEC, 400 F.2d 778, 785 (D.C. Cir.

the APA does not require formal hearing in any adjudication. Only those adjudications which are "required by statute to be determined on the record after opportunity for agency hearing" must be conducted in accordance with the formal hearing requirements of the APA. 5 USC 554(a), see U.S. v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972), citing Siegel v. AEC, 400 F.2d 778, 785 (D.C. Cir. 1968), U.S. v. Florida East Coast Ry., 410 U.S. 224 (1973). While a statute need not use the precise words. "on the record" in order to require a formal hearing, it must be evident that Congress intended to require a formal hearing. U.S. v. Allegheny-Ludlum Steel Corp., supra, 406 U.S. at 757, U.S. v. Florida East Coast Ry. supra, 410 U.S. at 234-38.

Section 189a, which is the only AEA provision on hearings, does not explicitly require "on the record" hearings:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceedings for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding brought under the provisions of section 182, and in any proceeding for the payment of compensation, an award or royalties under Section 156, 186 (c) or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as

---

1968); City of West Chicago v. NRC, 710 F.2d 632, 641 n.7 (7th Cir. 1983).

a party to such proceeding.

The legislative history of the AEA is not absolutely clear regarding whether Congress intended Section 189 hearings to be on-the-record hearings conducted in accordance with APA Sections 554, 556 and 557, but it does suggest that this might be the case. As discussed above in Section II.B.1, the original legislative proposals for the 1954 Atomic Energy Act did not explicitly mention hearings, but merely indicated that the actions of the Commission were to be subject to the requirements of the APA. At least one witness criticized the proposed legislation for its vagueness on the matter, and suggested that Congress be more explicit as to whether hearings were to be "on the record":

> Section 181 of the committee print provides that "The provisions of the Administrative Procedure Act shall apply to all 'agency acts', as that term is defined in the Administrative Procedure Act, specified in this act." It further provides that "full regular administrative procedures shall be followed" for those acts of the Commission which can be made public. As you know, however, much of what happens under the Administrative Procedure Act is dependent upon the basic legislation giving rise to the administrative procedure itself. Unless the basic legislation requires the licensing proceeding to be determined upon the record after opportunity for an agency hearing, the agency is not required to follow the provisions as to hearing and decision contained in Sections 7 and 8 of the Administrative Procedure Act.

I strongly recommend that any ambiguity which now exists with respect to the requirements of section 181 be eliminated. This might be done in one of two ways, either by writing into the section express language requiring hearings or through appropriate reference making Sections 7 and 8 of the Administrative Procedure Act applicable.

Supplemental Statement of Joseph Volpe, Volpe, Boesky, and Skallerup, Joint Committee Hearings, Vol. II, at 152-53, reprinted in Legislative History at 1786-87. The Special Committee on Atomic Energy of the Association of the Bar of City of New York also submitted a supplemental written statement on H.P. 8862 and S. 3323 which implicitly suggests that formal hearings be required:

Chapter 16. JUDICIAL REVIEW AND ADMINISTRATIVE PROCEDURE

Page 74, line 12: At the end of this sentence, the following words should be added: "and, unless otherwise provided, in every adjudication by the Commission under this act an opportunity for a hearing shall be afforded the parties to the adjudication."

Under the bill, it is not clear whether hearings are required. Unless hearings are to required, the hearing provisions of the Administrative Procedures Act will

not come into play.

Hearings at 416-17, reprinted in Legislative History at 2050-51. Subsequently, H.R. 9757 and S . 3690 were introduced, which included for the first time a provision for hearings. See H.R. 9757. Section 181, S. 3690, section 181, reprinted in 1 Legislative History at 624-25. 728-29 respectively. However, neither bill indicated whether the hearings were to be formal, 'on-the-record' hearings. The only colloquy on the subject of hearings occurred between Senators Anderson and Hickenlooper:

Sen. Anderson.

I appreciate the suggestion of the able Senator from Iowa; but now that he has mentioned chapter 16, which provides for judicial review and administrative procedure, Section 181 reads in part as follows:

> Sec. 181. General: The provisions of the Administrative Procedure Act shall apply to 'agency action' of the Commission, as that term is defined in the Administrative Procedure Act.

And so forth. I read that, and I thought It meant that the provisions of the Administrative Procedure Act in relation to hearings automatically become effective in connection with the granting of licenses by the Commission. But. unfortunately, the Administrative

Procedure Act, when we read it - and again I say I read it as layman, not a lawyer - does not require a hearing unless the basic legislation requires a hearing. If the basic legislation does require a hearing, a hearing is required by the Administrative Procedure Act. But in this case, the basic legislation does not require a hearing, so the reference to the Administrative Procedure Act seems to me to be an idle one. I merely am trying to say that I believe these things should be carefully considered.

* * * *

Sen. Gore.

In whom is this discretionary authority vested?

Sen. Anderson.

In the Commission, I believe. As I have said, it may be that I have misread the bill; it may be that the bill requires a hearing. But because I feel so strongly that nuclear energy is probably the most important thing we are dealing with in our industrial life today, I wish to be sure that the Commission has to do its business out of doors, so to speak, where everybody can see it. Although I have no doubt about the ability or integrity of the members of the Commission, I simply wish to be sure they have to move where everyone can see every step they take; and if they are to grant a

license in this very important field, where monopoly could so easily be possible, I think a hearing should be required and a formal record should be made regarding all aspects, including the public aspects.

Sen. Hickenlooper.

I wonder whether the Senator from New Mexico does not feel that sufficient protection is afforded in section 181 and in section 182-b. In that connection, I should like to have the Senator from New Mexico refer to section 182-a on page 85, beginning on line 9, from which I now read, as follows:

> Upon application the Commission shall grant a hearing to any party materially interested in any "agency action."

So any party who was materially interested would automatically be afforded a hearing. upon application for one. Then, in Section 182-b this provision is found:

> b. The Commission shall not issue any license for a utilization or production facility for the generation of commercial power under section 103, until it has given notice in writing to such regulatory agency, as may have jurisdiction over the rates and services of the proposed activity, and until it has published

> notice of such application once each week for four weeks in the Federal Register, and until 4 weeks after the last notice.

Sen. Anderson.

Mr. President. I may say to the Senator from Iowa that when in Committee we discussed this language. I thought it was sufficient. But I do not find myself able to tie the Administrative Procedure Act to this requirement of the bill. To return to section 181 and the portion on page 85 reading -

> Upon application, the Commission shall grant a hearing to any person materially interested in any "agency action" -

Let me say I think it is important to tell who may be interested, and therefore the widest publicity is necessary. For example, if the Commission were going to grant a franchise to enable someone to establish a new plant inside the Chicago area, there might be many persons who might be interested, but they would not know that the matter was under consideration. I am trying to say that the people who are interested will not be reached unless they are given notice. I say again to the Senator from Iowa that nothing in the section may need changing. I am merely stating that, upon a second reading, some doubts arise, and I wonder what the section actually provides.

100 Cong. Rec. 9999-10000 (emphasis added), reprinted in 3 Legislative History at 3072-73. Senator Anderson's passing reference to a "formal record" in the midst of an extended argument that the legislation should explicitly address the need for formal hearings is some evidence that Congress intended Section 189 hearings to be formal and adversarial in nature at least in the case of nuclear power reactors. Indeed, Senator Anderson's stated rationale for requiring a "formal record" in power reactor licensing cases strongly resembles the rationale for requiring "on the record" hearings in the minds of the drafters of the APA:

> One is when the investigation and the possible resulting action are of such far-reaching importance to so many interests that sound and wise government, is thought to require that proceedings be conducted publicly and formally so that information on which action is to be based may be tested, answered if necessary, and recorded. The other type is where the differences between private interests or between private interests and public officials have not been capable of solution by informal methods but have proved sufficiently irreconcilable to require settlement through formal public proceedings in which the parties have an opportunity to present their own and attack the others' evidence and arguments before an official body with authority to decide the controversy. [citing Administrative Procedure in Government Agencies. S. Doc. No. 8, 77th Cong., 1st Sess. at 43].

The 1957 amendments to the AEA, which required A

mandatory hearing for both the construction permit and operating license, together with the AEC's use of trial-type procedures in uncontested hearings, resulted in increasing criticism of the licensing process. In 1960, the Chairman of the AEC initiated a study of the AEC's regulatory functions to identify possible improvements to the process or the AEC's organizational structure. See Atomic Energy Commission, Report on the Regulatory Program of the Atomic Energy Commission (February 1961) ("AEC Report"), reprinted in Staff of the Joint Committee on Atomic Energy. Improving the AEC Regulatory Process, 87th Cong., 1st Sess. 399 (1961) ("1961 Study"). Shortly thereafter, the Chairman of the Joint Committee directed the Joint Committee Staff to prepare a similar study to assess the AEC's organization and regulatory procedures, and the impact of the 1957 amendments. See Staff of the Joint Committee on Atomic Energy, Improving the AEC Regulatory Process, 87th Cong., 1st Sess. (1961).

The AEC Study identified a number of problems with the structure of the AEC and recommended several solutions. See AEC Report, reprinted in 1961 Study at 400, 420-21. However, on the subject of hearings the AEC Study recommended only the "amendment of section 189 of the [AEA] to permit dispensing with mandatory public hearings prior to issuance of reactor operating licenses under certain prescribed conditions." Id. at 400. The AEC Study said with regard to mandatory hearings:

> The Joint Committee might well consider amendment of section 189a of the act in order to permit the Commission to dispense with the mandatory public

> hearing prior to issuance of an operating license, on making a finding that the particular reactor presents no substantial novel safety questions. The finding would, of course, be appropriate only in the case of a well-established design and satisfactory conditions as to the site. Without depriving any interested person of the right to demand a public hearing prior to issuance of an operating license, this would tend to eliminate the delay and expense of a second hearing where a sufficiently proved design and conservative selection of a site combined to satisfy the Commission that such a course was safe.

AEC Study, reprinted in 1961 Study at 410. According to the AEC, excessive formality in licensing hearings was not a concern:

> Some question has been raised as to excessive formality in reactor licensing proceedings as presently conducted. The regulations of the Commission now permit, and even encourage, the submission of evidence in written form, under 10 CFR Section 2.747(a). There is much to be said, in the present state of reactor operation, in favor of orally making a record full and explicit in the interests of disclosure to the public of the pertinent facts and considerations entering into the decision. A State or local public official or a member of the public attending a hearing may well be alerted by the testimony to the desirability of applying for leave to intervene. In a sense, therefore, the conduct of proceedings through oral testimony is an affirmative contribution to due

> process, as well as to greater public confidence in the Commission's licensing methods and in the regulated industry. It is possible that substantially less full presentation of testimony would be appropriate in some cases after there has been more experience in the operation of large power and test reactors. It seems clear that the major part of the preparation and expense which are sometimes attributed to the hearing and to evaluation by the staff and the Advisory Committee on Reactor Safeguards would have to be undertaken by the licensee in any event in order to plan and construct an efficient and safe plant.

Id. at 410-11. Thus, the AEC did not regard hearing formality as a problem.

Simultaneously, the Staff of the Joint Committee began preparing its report on AEC organization and procedures. In the course of preparing the 1961 Study the Joint Committee Staff sent two letters to the Commission requesting their views on, inter alia, the appropriateness of the AEC's use of formal, trial-like procedures in uncontested proceedings. See November 7, 1960 letter from James T. Ramey, Executive Director of the Staff of the Joint Committee to AEC Commissioner Loren K. Olsen, November 16, 1960 Letter from James T. Ramey to Commissioner Olsen. reprinted in 2 1961 Study at 575-78, 587, respectively. Consistent with the findings set forth in the AEC Study, the Commission replied in letters which supported the use of mandatory hearings at the construction permit phase, and the use of formal, trial-type hearing procedures, in particular cross examination. See November 30, 1960 Letter from Commissioner Olsen to

James T. Ramey December 22, 1960 Letter from Commissioner Olsen to James T. Ramey, reprinted in 2 1961 Study at 578-589.

Despite the conclusions of the AEC as expressed in the 1960 AEC Study and the two letters from Commissioner Olsen to the Joint Committee, the 1961 Study considered hearing formality to be a problem with respect to reactor licensing, but in the context of six other interrelated problems, viz.:

1. Duplication of effort involved in a reference to the ACRS of problems which have already been considered.

2. Overdependence on formal hearings before a hearing examiner as a means of reviewing determinations on applications by the staff and the ACRS.

3. The lack of provision for the review of staff approvals by a technically qualified body.

4. The inappropriateness of the present hearing procedure to secure the full benefit of scientific testimony and the technical judgments of the expert witnesses.

5. The lack of an independent technically qualified body to review staff appraisals of AEC and military reactors not subject to AEC licensing.

6. The lack of provision for a technically qualified

body to review staff appraisals of AEC and military reactors not subject to AEC licensing.

7. The failure to give reality to the right of intervention by providing adequate public notice of the safety questions to be considered at public hearings.

Id. (emphasis added).

Only the 1961 Study's discussion of Item 4 contains any direct criticism of formal, trial-like hearing procedures:

> A less apparent but nonetheless serious objection to the present process for facility licensing at the level beyond the ACRS review is that it is ill designed to secure the full benefit of scientific and technical expertise. . .There are a number of reasons why the present procedure of a formal hearing does not conduce to the effective use of highly qualified scientists and engineers as expert witnesses.

1961 Study at 51. The 1961 Study goes on to suggest that the problem could be solved in the context of a "different type of hearing, with more ready participation of scientific and technical witnesses, and with the responsibility for the decision after the hearing process resting on a technically-qualified person or group. . ." Id.[14]

---

[14]We also note that the background materials contained in the Appendix to the 1961 Study also do not focus on hearing formality as

To address these problems, the 1961 Study recommended formation of an Atomic Safety and Licensing Board within the AEC, and described how such a board would function. See 1961 Study at 69-75. The 1961 Study proposed that "informal" methods of conducting hearings be permitted, such as "'roundtable exchanges', with easy participation by representatives of the applicant, the AEC staff, intervenors, and the Board, without the formality of successive witnesses on the witness stand." Id. at 72. Significantly, however, the 1961 Report did not propose abandonment of formal hearing requirements and in fact specifically refers to certain formal hearing requirements contained in the APA as continuing to be required. For example, the 1961 Report states that a formal record of a hearing would be required to be kept, and cross-examination would be permitted if necessary. Moreover, in license suspension or revocation, the 1961 Report avers that "the precautions prescribed by the Administrative Procedure Act should be carefully observed." Id.

Comments by the public on the 1961 Study were subsequently published in a separate volume in June. See Joint committee on Atomic Energy, Views and Comments on Improving the AU Regulatory Process, 87th Cong., 1t Sess. (1961) ("1961 Study Comments"). At this time, Professor Kenneth Culp Davis first presented his criticisms of the AEC's use of formal, trial-like procedures in licensing hearings. Id. at 23-32. Professor Davis did not support a

---

concern per se. See, e.g., 2 Improving the AEC Regulatory Process 423-557 (excerpts from Berman and Hydeman, Atomic Energy Research Project of the University of Michigan, The Atomic Energy Commission and Regulating Nuclear Facilities)

change in the AEC's organizational structure. Id. at 23. Rather. he criticized "the tendency to use forms of adjudication when there is nothing to be adjudicated." Id. After discussing why trial procedures should not be used in uncontested cases, or in contested cases without issues of fact Id. at 24-28, and arguing against establishment of an Atomic Safety and Licensing Board. Id. at 28-30, Professor Davis lists a number of recommendations on hearing procedures.

Hearings on the issues raised in the 1961 Study were held by the Joint Committee in June 1961. See Radiation Safety and Regulation: Hearings Before the joint Committee on Atomic Energy, 87th Cong., 1st Sess. ("1961 Hearing Proceedings"). In general the witnesses repeatedly expressed concerns with the need for hearings at both the construction permit and operating license stage, the formality of hearings in uncontested proceedings, and the lack of technical and scientific backgrounds of decisionmakers at hearings. See e.g., 1961 Hearing Proceedings at 262-268 (statement of George Trowbridge); 274, 276-79 (statement of William Kennedy, Counsel, Atomic Products Division, General Electric Co.), 281, 282-86 (statement of Arvin E. Upton, Secretary, Atomic Power Development Associates), 349-359 (statements of William Berman and Lee Hydeman, Co-Directors, Atomic Energy Research Project, University of Michigan Law School). 369-372 (statement of William Mitchell, legal consultant to the Staff of the Joint Committee for the 1961 Report). The issue of overformalization of the hearing process was focused most sharply in a panel discussion at the hearing. involving Professor Kenneth Davis, Professor David Cavers, Commissioner Olsen, Lee Hydeman and ACRS member Dr. Theos J. Thompson. Both Professor Davis' and Professor Cavers' primary criticisms were of the

use of trial-type procedures in uncontested hearings. 1961 Hearing Proceedings at 373-74, 375. Commissioner Olsen contended that trial-type hearings were desirable, and in any case required by the 1957 amendments to the AEA Id. at 374-375. Thus began an argument over the nature of the 1957 amendments between the Commission and Professor Davis. Professor Davis disagreed with Commissioner Olsen during the panel discussion, Id. at 376, and later submitted a written statement and an article he authored from the American Bar Association Journal where he continued to criticize the use of trial-type procedures in proceedings, and presented a rebuttal to Commissioner Olsen's argument that the 1957 amendments required formal, on-the-record adjudicatory procedures. Id. at 419-24. The Commission responded with a September 6. 1961 letter by Neil Naiden, AEC General Counsel and enclosing a letter to the ABA Journal written by Commissioner Olsen.

Based upon these materials. it appears that formality in licensing hearings per se was not considered to be the primary regulatory problem facing the AEC. Rather, the concern was with the use of on-the-record, trial-like procedures for uncontested hearings. Moreover, this concern was part of a number of inter-related issues involving the structure and regulatory procedures of the AEC, in particular the requirement for mandatory hearings at both the construction permit and operating license stages, and the lack of technical and scientific backgrounds of hearing examiners at licensing hearings.

In response to the concerns identified in the two reports and at the 1961 hearings, identical legislation was introduced in

the House and Senate (S. 2419, H.R. 8708). Hearings on the bills were held on April 17, 1962. As with the 1961 hearings, criticisms were generally directed at the use of mandatory hearings in uncontested proceedings and the lack of technical expertise on the part of the hearing examiner in resolving technical Issues in licensing. See, e.g., AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491. Before the Subcommittee on Legislation of the Joint Committee of Atomic Energy, 87th Cong., 2d Sess. at 32, 34 (testimony of Herzel Plaine, Chairman, Special Committee on Atomic Energy Law, American Bar Association), 64-74 (testimony of Raoul Berger, Chairman, Administrative Law Section, American Bar Association). One exception was Professor Dean F. Cavers, one of the consultants to the Joint Committee Staff during preparation of the 1961 Study. Professor Cavers did argue that Section 189a did not require hearings to be on the record. Id. at 42. However, a fair reading of his testimony and a supplementary written statement discloses that his concerns did not rest solely upon the use of trial-like procedures. Rather, his statements disclose interrelated concerns about the need to assure open hearings, the futility of trial-like procedures in uncontested proceedings, the use of non-technical hearing examiners to conduct hearings, and the desire to avoid repetitious technical reviews by a licensing board after review by the AEC Staff and the ACRS. Id. at 40-58. Moreover, in a joint written statement with Mr. William Mitchell, Professor Cavers admits of the need for formal hearing procedures in cases where there are disputed matters of fact, and proposes that instead of a mandatory requirement for a formal hearing, that parties could request (or the Commission could order) that a hearing be conducted in accordance with the on-the-record provisions of the APA. Id. at 56-57.

Following the 1962 hearing, S. 3491 and H.R. 12336 were substituted for S. 9244 and H.R. 8708 S. 3491 was eventually passed and signed into law on August 29, 1962.[15] The 1962 amendments accomplished two things. First, they amended section 189a by deleting the requirement that hearings be held at the operating license stage (the second sentence of Section 189a as amended in 1957), and substituting the following[16]:

> The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register, on each application under section 103 or 104b, for a construction permit for a facility, and on any application under section 104c, for a construction permit for a test facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of any request therefor by any person whose interest may be affected, issue an operating

---

[15] P.L. 87-615, 76 Stat.409 (1962).

[16] Apparently, one reason that Congress decided to relax the mandatory hearing requirement in the 1957 amendments (so that hearings would only be required at the construction permit stage) on that rationale that safety concerns would be largely identified and resolved at the construction permit stage. See S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962). R.R. No. 1966, 87th long.. 2d-Sess. 8 (1962). This is ironic, in light of the line of AEC and NRC cases which have approved the deferral of safety issues (including adequacy of design) to the operating license proceeding on the basis that until a plant begins operation, no threat to public safety exists. See Power Reactor Development Co. v. International Union of Electrical, Radio, and Machine Workers, 367 U.S. 396 (1961) Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2 , ALAB-129, 6 AEC 414, 420 (1973) Washington, Public Power Supply System (WPPSS Nuclear Projects, Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1226-28 (1982).

> license or an amendment to a construction permit or an amendment to an operating license without a hearing. but upon thirty day's notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty day's notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

Second, the 1962 amendments added a new Section 191a, which authorized the establishment of an Atomic Safety and Licensing Board:

> Notwithstanding the provisions of sections 7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and licensing boards, each composed of three members, two of whom shall be qualified in the conduct of administrative proceedings, to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, or any other provision of law, or any regulation of the Commission issued thereunder.

Thus, the 1962 amendments addressed the two significant problems identified by the 1961 Study and witnesses at the 1961 and 1962 hearings - the duplication of hearings

attributable to the 1957 amendments' requirement for hearings at both the construction permit and operating license stage, and the lack of a technical background by the hearing examiner.

It has been suggested that the following discussion in the Senate and House Reports reflects Congress' understanding that Section 189a was never intended to require formal licensing hearings:

> Members of the Special Committee on Atomic Energy Law of the American Bar Association, concerned over a trend toward judicialization in the AEC administrative process, had recommended that this legislation be amended to specifically authorize the Commission to use methods in addition to trial-type proceedings for the development of scientific and technical information affecting safety.
>
> The AEC has contended that the type of hearing procedures followed by the Commission is required to carry out the intent of the 1957 amendments to the Atomic Energy Act and their legislative history as well as the Administrative Procedure Act.
>
> To the extent that the legislative history of the 1957 amendments may not be clear, it is expressly stated here that the committee encourages the Commission to use informal procedures to the maximum extent permitted by the Administrative Procedure Act.

* * * *

> Having pointed out the desirability of informal procedures, and the legal latitude afforded the Commission to follow such procedures, the committee does not believe it necessary to incorporate specific language in the legislation requiring informal procedures.

S. Rep. No. 1677, p.6, H.R. Rep. No. 1966, p.6. However, immediately thereafter follows a long discussion of the "notwithstanding" clause in Section 191a, in which the Joint Committee expressed its view that the "great bulk of the [APA] will remain applicable, pursuant to section 181. . .", and that formal hearings are required "without question in contested cases. . ." Id. at 6-7 (discussed more fully in the next paragraph).

In our view, the implication is clear from the extensive legislative history of the 1966 amendments that Congress understood that formal hearings were required at minimum in contested power reactor licensing hearings under Section 189, and that only in uncontested construction permit hearings were informal procedures permitted in power reactor cases.

Finally, the inclusion of the "notwithstanding" clause of Section 191a dispels any further doubt that Congress understood that formal, trial-like procedures are required for at least some cases under Section 189a. That clause states, "notwithstanding the provisions of section 7(a) and 8(a) of

the Administrative Procedure Act," the Commission is authorized to establish an Atomic Safety and Licensing Board. Since Sections 7 and 8 of the APA (5 USC 556 and 557) are applicable only to on-the-record hearings, see APA Section 5, 5 USC 554, the exemption from the requirements Sections 7(a) and 8(a) which is continued in the first clause of Section 191a would not have been necessary unless the Atomic Safety and Licensing Board were to conduct formal, on-the-record hearings. The Senate and House reports clearly indicate the Joint Committee's view that power reactor licensing hearings were to be conducted in accordance with the APA's provisions for on-the-record hearings:

With respect to the effect of this legislation on the Administrative Procedure Act, a representative of the section on administrative law of the American Bar Association suggested that the application of section 1 (of the 1962 amendments, which added the provisions of Section 191a) should be limited to non-contested cases. Underlying this suggestion was his concern that the bill, because of the language "Notwithstanding the provisions of sections 7(a) and 8 of the Administrative Procedure Act," perhaps limited the applicability of important provisions of the Administrative Procedure Act.

First, it should be pointed out that this language is intended only to provide the Commission with specific authority to use a three man board to preside at hearings in lieu of a hearing examiner, and to permit final, ans well as intermediate decisions to be made by the board. It is probable that no reference to the Administrative Procedure

Act is required. However, that act does state:

> No subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly (5 USC 1011).

Out of an abundance of caution, and at the suggestion of the Commission, the committee has referred to the Administrative Procedure Act in the language which initiates section 1 of the bill. To make the limited applicability of this language even more clear, the reference to section 8 of the Administrative Procedure Act, contained in H.R. 8708 and S. 2419, has been changed to specify section 8(a) of the act, concerning intermediate and final decisions.

> The great bulk of the provisions of the Administrative Procedure Act will remain applicable, pursuant to section 181 of this act, and the only exceptions authorized by these amendments are to permit the Board to preside at hearings in lieu of a hearing examiner, and to permit the Board to render final as well as intermediate decisions.

> With this explanation as background, the committee does not believe it necessary to limit the applicability of section 1 to noncontested cases. Without question, more formal procedures are required in contested cases, especially those involving compliance. However, as pointed out by one expert witness during the hearings, the technical skills of the Atomic Safety

> and Licensing Board might be especially valuable in a contested case. As noted earlier, this board is designed as a flexible experiment in administrative law and the Joint Committee does not deem it advisable to limit the use of the Board by the Commission without a full trial of its ability to function in varied types of cases (emphasis added).

S. Rep. No. 1677, 87th Cong., 2d Sess. At 6-7 (1962), H. Rep. No. 1966, 87th Cong., 2d Sess. at 6-7 (1962). We further note that the Senate and House Reports indicate that the inclusion of the "notwithstanding" clauses attributable to the concerns of a representative of the administrative law section of the ABA.[17] Significantly, the testimony of that representative, Mr. Raoul Berger, indicates that his concern was with the use of trial-type procedures in uncontested cases, but that the APA requirements for on-the-record adjudications should be adhered to in all contested hearings:

> As I understand it Mr. Chairman, 14 out of 15 of your licensing cases have been uncontested. And the central problem appears to be whether trial-type hearings should be employed under section 7 and 9 of the Administrative Procedure Act in uncontested cases. We would agree that you should not employ

---

[17]The identification of Mr. Raoul Berger, the representative from the ABA administrative law section, as the impetus for the "notwithstanding" clause is significant because AEC Commissioner Olsen also asked that an exception from APA sections 7(a) and 8(a) on different grounds. See AEC Regulatory Problems: Hearings Before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 87th Cong., 2d Sess. 27-28 (1962).

> trial-type proceedings in uncontested cases, because we believe that, except for rulemaking, required by statute to be made on the record after opportunity for hearing, the Administrative Procedure Act confined trial-type hearings to the adjudication of disputes between adversaries who present controverted issues . . .Plainly an uncontested case does not involve controversial issues and disputes between adversaries, and in our judgment to use judicial trappings in that situation is incongruous and unnecessary.
>
> Mr. Hosmer directed himself to the question, of public hearings, which is something entirely different. You can have a public hearing with all the publicity you want without making it a Judicial trial . . .However, and this is one of chief reasons I am here today, your bills draw no distinction between uncontested and contested cases and under the language employed they would exempt both contested and uncontested cases from the Administrative Procedure Act.

AEC Regulatory Problems: Hearings on H.R. 12336 and S. 3491 Before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 87th Cong., 2d Sess. 64-66 (1962). In light of the language of the Senate and House Reports quoted above, as well as the statement of Mr. Berger, it is our view that the inclusion of the "notwithstanding" clause in Section 191a reflects Congress' intent that the APA provisions for on-the-record adjudications are applicable to power reactor licensing cases, as contrasted with informal hearings in rulemaking proceedings confined to written

submissions and non-record Interviews.

Whatever may be concluded from the legislative history with regard to Congress' intentions as to the nature of Section 189 hearings, it is clear that the AEC, and later the NRC, have long interpreted Section 189 as requiring formal hearings for licensing proceedings. Formal hearings were required from the start under AEC regulations. As pointed out above, the 1960 letters from Commissioner Olsen to James T. Ramey, Executive Director of the Joint Committee, the Commissioner's testimony before the Joint Committee at the 1962 hearings, a letter from Neil D. Naiden, General Counsel of the AEC to Mr. Ramey, and a letter from Commissioner Olsen to the editor of the American Bar Association Journal are consistent in their view that Section 189 requires that licensing hearings be formal, trial-like hearings in conformance with the on-the-record provisions of the APA.

The AEC's position is also reflected in two legal memoranda prepared by OGC addressing hearing procedures. In an October 11, 1965 memoranda to the Commissioners on legal problems relating to the conduct of mandatory hearings, then General Counsel Joseph F. Hennessey concluded that the "requirement for a mandatory hearing imposed by section 189. . .is a requirement for an adjudication 'to be determined on the record after opportunity for agency hearing' subject to sections 5, 7, and 8 of the APA." Id. at 6. The following year, in an internal OGC note to Mr. Hennessey, Mr. Howard Shapar concluded that formal, on-the-record hearings were contemplated by Congress, as evidenced by the legislative history for the 1957 and 1962 amendments. See Note from Howard Shapar to Joseph Hennessey (April 3, 1967).

More importantly, the NRC has asserted in litigation that Section 189a requires formal hearings in licensing adjudications. For example, in Siegel v. AEC, 400 F.2d 785 (D.C. Cir. 1968), the question before the D.C. circuit was whether Section 189 required formal hearings in association with rulemakings. The Court referred to the Commission's representation that it has:

> invariably distinguished between [adjudication and rulemaking, and has provided formal hearings in licensing cases, as contrasted with informal hearings in rulemaking proceedings confined to written submissions and non- record interviews. [The Commission] Insists that this approach is contemplated by the Administrative Procedure Act, which applies to all agency action taken under the Atomic Energy Act.

Id. at 785. See also Philadelphia Newspapers, Inc. v. NRC, 727 F.2d IT95. 1199-1202 (D.C. Cir. 1984).

Although the NRC has taken the position that not every licensing hearing need be conducted in accordance with the formal requirements of the APA, the NRC's decisions in this regard have nonetheless acknowledged that formal hearings are required in at least some types of licensing proceedings. In Nuclear Fuel Services (Erwin, Tennessee), CLI-80-27, 11 NRC 799 (1980), the Commission decided that the APA, 5 USC 554(a) (4), and 10 CFR 2.77a exempts materials license proceedings involving the conduct of a military function from the requirements for a formal hearing. Id. at 802. Significantly, the Commission did not take the position that

no formal hearings are required by Section 189. Rather, the Commission stated that Section 189a did not require formal adjudicatory hearings in "all licensing proceedings." Id., n.4. The choice of the word "all" instead of, the word "any", implicitly acknowledges that a formal hearing is required for some licensing proceedings.

In Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI 82-2, 15 NRC 232 (1982), the Commission expanded upon its suggestion in NFS by definitively holding that formal hearings are not required by Section 189a in materials licensing proceedings. Again, the Commission did not rule out the possibility that Section 189a required formal hearings in other non-materials licensing proceedings:

> Thus, we believe that the word "hearing" in section 189a can be interpreted as allowing an informal hearing in at least some licensing cases.

Id. at 254. And the discussion in note 27 of Kerr-McGee leaves the distinct impression that one type of proceeding requiring formal hearings are facilities licensing. The Commission's decision In Kerr-McGee was upheld by the 7th Circuit in City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). However, the 7th Circuit carefully limited its opinion to materials licensing proceedings:

> Despite the fact that licensing is adjudication under the APA, there is no evidence that Congress intended to require formal hearings for all Section 189(a)

activities.

Id. at 645 (emphasis added). Since the Kerr-McGee and the West Chicago Decisions, the Licensing Board and the Appeal Board have noted with approval the suggestion in Kerr-McGee that formal hearings are required by Section 189a in facilities licencing proceedings. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-107, 16 NRC 1667, 1671-76 affirmed, ALAB-788, 20 NRC 1102, 1178 (1984).

More significantly, in two cases the D.C. Court of Appeals has indicated in dicta that a formal hearing is required under Section 189a for licensing proceedings. See Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1444-45, n.12 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1984), Porter County Chapter v. NRC, 606 F.2d 1363, 1368 (D.C. Cir 1979).

In sum, Section 189a does not explicitly require a formal. trial-type hearing, but its legislative history does suggest that formal hearings are required for power reactor licensing cases. Section 191 and the legislative history of that strongly indicate that Congress intended the hearings afforded by Section 189a in power reactor licensing cases to be "on the record". The 7th Circuit has held that Section 189a does not require formal hearings in all licensing proceedings, but the decision was carefully limited to materials licensing. Also, the D.C. Circuit has twice suggested that formal hearings are required in facilities licensing proceedings and there has been a longstanding agency interpretation that Section 189a requires formal hearings in nuclear power plant adjudications

- an interpretation which has not been directly challenged by the Commission's two decisions holding that there is no right to e formal hearing in materials licensing proceedings. To be sure, none of the legislative history or dicta in court decisions refer specifically to power reactor license renewals, and the language of Section 191 requires only that formal hearings be required in some cases. If contested renewal proceedings could be distinguished from contested construction permit and operating licensing proceedings in terms of their public safety importance or type of issues in dispute, it is possible that, as in City of West Chicago, supra, pg. 40, one could distinguish the legislative history and argue reasonably for informal hearings. However, based on discussions with Staff on the nature of life extension issues, we see no basis at this time for any distinctions. After weighing these considerations, it is our conclusion that hearings on contested issues in any proceeding for renewal of operating licenses should probably be formal, on-the-record hearings.

That the NRC may decide to require formal, on-the-record license renewal hearings does not mean that such hearings must be conducted under the procedures of 10 CFR Part 2, Subpart G, Rules of General Applicability. As noted above, it is well-recognized that the NRC's rules of practice go well beyond the procedural requirements of the APA. For example, nothing in the APA requires the extensive discovery provided for in 10 CFR 2.740 through 2.744.

* * *

Supreme Court, U.S.
FILED
NOV 20 2000
CLERK

(2)

No. 00-422

IN THE

Supreme Court of the United States

October Term, 2000

NATIONAL WHISTLEBLOWER CENTER,

Petitioner,

v.

NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA and CALVERT CLIFFS NUCLEAR POWER PLANT, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT CALVERT CLIFFS NUCLEAR POWER PLANT, INC.

David R. Lewis
Counsel of Record
SHAW PITTMAN
2300 N Street, N.W.
Washington, DC 20037-1128
(202) 663-8474

November 20, 2000

Balmar Legal Publishing Services, Washington, DC 202-682-9800

25pp

QUESTION PRESENTED

Whether the Nuclear Regulatory Commission properly denied the National Whistleblower Center's (NWC) petition to intervene in an adjudicatory proceeding when NWC failed to meet the twice-extended deadline for filing contentions.

LIST OF PARTIES

In the court below, the National Whistleblower Center was the petitioner; the Nuclear Regulatory Commission (NRC) and the United States were respondents; and Baltimore Gas and Electric Company (BGE) intervened as a party. At that time, BGE was the owner and operator of the Calvert Cliffs Nuclear Plant, which is the subject of this litigation. After the court below issued its decision, in connection with electric industry restructuring in the State of Maryland, ownership of Calvert Cliffs was transferred to Calvert Cliffs Nuclear Power Plant, Inc. (CCNPPI), which is now the owner and licensed operator of the plant. Both BGE and CCNPPI are wholly-owned subsidiaries of Constellation Energy Group, Inc. CCNPPI, as successor in interest to BGE, is properly a respondent in this Court.

RULE 29.6 STATEMENT

Respondent Calvert Cliffs Nuclear Power Plant, Inc. has no subsidiaries. It is an indirect wholly-owned subsidiary of Constellation Energy Group, Inc., a holding company with publicly traded securities. Constellation Nuclear, LLC, is the direct parent of Calvert Cliffs Nuclear Power Plant, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

RULE 29.6 LISTING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENT 8

I. THE ISSUES RAISED BY NWC ARE NOT ACTUALLY PRESENTED BY THIS CASE 8

II. THERE IS NO CONFLICT AMONG THE COURTS 15

III. THE ISSUE ACTUALLY PRESENTED HERE INVOLVES A ROUTINE PROCEDURAL RULING WITH LITTLE SIGNIFICANCE BEYOND THE PARTICULAR CIRCUMSTANCES OF THIS CASE 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases **Page**

American Farm Lines v. Black Bull Freight Serv., 397 U.S. 532 (1970) 14

BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974) 2

Burnham Trucking Co. v. United States, 216 F. Supp. 561 (D. Mass. 1963) 12

Carstens v. NRC, 742 F.2d 1546 (D.C. Cir. 1984) 14

Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989) 9

City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983) 9, 13, 15

Davis v. United States, 417 U.S. 333 (1974) 15

Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973) 14

Kenrich Petrochemicals, Inc. v. NLRB, 893 F.2d 1468 (3d Cir. 1990) 10

Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977) 9

Mister Discount Stockbrokers, Inc. v. SEC, 768 F.2d 875 (7th Cir. 1985) 10

NCAA v. Smith, 525 U.S. 459 (1999) 13

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 14

NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) 17

Philadelphia Newspapers, Inc. v. NRC, 727 F.2d 1195 (D.C. Cir. 1984) 10, 15

Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968) 9, 15

Taylor v. District Engineer, 567 F.2d 1332 (5th Cir. 1978) 9

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 16

Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) 13

Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984) ("UCS I") 10, 15

Union of Concerned Scientists v. NRC, 920 F.2d 50 (D.C. Cir. 1990) ("*UCS II*") 2, 10, 14, 15

United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972) 9, 15

United States v. Florida E. Coast Ry., 410 U.S. 224 (1973) 9

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 13

Statutes and Regulations

Administrative Procedure Act, 5 U.S.C. §§ 551-558 ..... *passim*

42 U.S.C. § 2231 8

42 U.S.C. § 2239 (a) 9

10 C.F.R. Part 2, Subpart G 10-12

10 C.F.R. Part 2, Subpart K 9

10 C.F.R. Part 2, Subpart L 9

10 C.F.R. Part 2, Subpart M 9

10 C.F.R. Part 2, Appendix A 12

10 C.F.R. § 2.703(b) 12

10 C.F.R. § 2.711 14

10 C.F.R. § 2.711(a) 4-5

10 C.F.R. § 2.714 ..... *passim*

10 C.F.R. § 2.715a 12

10 C.F.R. § 2.718 ..... 12, 14

10 C.F.R. §§ 2.740 – 2.744 ..... 10, 12

10 C.F.R. § 2.756 12

56 Fed. Reg. 64,943 (1991)..... 11
63 Fed. Reg. 20,663 (1998)..... 2
63 Fed. Reg. 27,601 (1998)..... 3
63 Fed. Reg. 31,813 (1998)..... 3
63 Fed. Reg. 36,966 (1998)..... 3
63 Fed. Reg. 41,872 (1998).....3-4

No. 00-422

IN THE
Supreme Court of the United States
October Term, 2000

NATIONAL WHISTLEBLOWER CENTER,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA and CALVERT CLIFFS NUCLEAR POWER PLANT, INC.,
Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CALVERT CLIFFS NUCLEAR POWER PLANT, INC.

STATEMENT OF THE CASE

This case arises out of a proceeding before the Nuclear Regulatory Commission (NRC) to renew the operating licenses for the Calvert Cliffs Nuclear Power Plant. Petitioner National Whistleblower Center (NWC) filed a petition to intervene and request for a hearing in the proceeding. The

NRC denied the petition because NWC failed to file its contentions within the deadline set by the NRC's scheduling orders, even though the deadline had been twice extended at NWC's request.[1] Because the issues here are largely procedural in nature, it is necessary to set out the procedural history of the case in some detail.

The NRC proceeding formally began when Baltimore Gas and Electric Company (BGE)[2] filed its three-volume application to renew the Calvert Cliffs licenses on April 8, 1998.[3] The application sought to extend the licenses for an additional 20 years. The NRC published a notice in the Federal Register on April 27, 1998 stating that the application had been received and was available for public inspection. 63 Fed. Reg. 20,663 (1998). On May 19, 1998, the NRC published another Federal Register notice advising that the renewal application had been found complete and acceptable

---

[1] Under NRC procedures, a person seeking to intervene as a party in an adjudicatory proceeding must assert at least one "contention" meeting the pleading requirements of 10 C.F.R. § 2.714. The contention must consist of a specific statement of the legal or factual issue sought to be raised, along with (a) an explanation of the bases for the contention; (b) the alleged facts or expert opinions supporting the contention, together with references to the sources and documents on which the intervenor intends to rely; and (c) sufficient information to show that a genuine dispute exists with the applicant on a material issue. 10 C.F.R. § 2.714(b)(2). *See BPI v. AEC*, 502 F.2d 424, 428-29 (D.C. Cir. 1974); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 52 (D.C.Cir. 1990) ("*UCS II*").

[2] At the time, BGE was the owner and licensed operator of the Calvert Cliffs facility. On July 1, 2000, ownership of the plant was transferred to respondent Calvert Cliffs Nuclear Power Plant, Inc. (CCNPPI), which is now the owner and licensed operator of the plant. BGE and CCNPPI are both wholly-owned subsidiaries of Constellation Energy Group, Inc.

[3] Most of the information in the application had been submitted to the NRC and was publicly available in the NRC's public document rooms in Washington and Calvert County in advance of the application. *See* Ct. App. Supp. App. at 1 (cover letter to BGE's application referencing the prior submittals, many dating to 1997 or earlier).

for docketing and that the opportunity to request a hearing on the application would be addressed in a later Federal Register notice. 63 Fed. Reg. 27,601 (1998). The NRC published a further notice on June 10, 1998 inviting public participation in the scoping process for the environmental impact statement on the renewal application. 63 Fed. Reg. 31,813 (1998). On June 24 through 26, BGE held three days of public meetings with the NRC to explain how its application had been put together and where information was located. Finally, on July 8, 1998, the NRC published its notice of an opportunity for a hearing. 63 Fed. Reg. 36,966 (1998). Interested parties were given 30 days to file a request for a hearing and a petition to intervene in accordance with NRC regulations set forth in 10 C.F.R. § 2.714.

NWC filed its petition to intervene and request a hearing on August 7, 1998, represented by counsel experienced in NRC practice and procedure. By this time, the renewal application had been available for public inspection for nearly four months. Yet NWC's petition raised no specific issues, asserting only that "a genuine dispute exists as to whether" the facility "can safely operate past the original specified lifetime" and that renewal of the operating licenses "poses an unacceptable health and safety risk to the public." Petition to Intervene, at 4.

The NRC's handling of the Calvert Cliffs proceeding was influenced by its recent Policy Statement on Conduct of Adjudicatory Proceedings, issued on July 28, 1998. 63 Fed. Reg. 41,872 (1998). In that Policy Statement, the Commission noted that it expected a growing number of proceedings in the near future on various matters, including license renewals, waste storage facility licenses, and transactions reflecting the restructuring of the electric utility industry. *Id.* at 41,873. In order to avoid unnecessary delays while maintaining a fair hearing process, the Commission provided its licensing boards with guidance and recommendations on methods of improving the efficiency of adjudicatory proceedings. Among other things, the

Commission advised that the parties should be expected to adhere to the time frames specified in the regulations and scheduling orders, and that extensions of time should be granted "only when warranted by unavoidable and extreme circumstances." *Id.* at 41,874.

On August 19, 1998, the Commission entered a case-specific order referring the Calvert Cliffs proceeding to an Atomic Safety and Licensing Board. Pet. App. 115a. The order also provided guidance to the Licensing Board on the conduct of the proceeding, drawing in part on the recently issued Policy Statement. The order established a "goal" of issuing a decision on the renewal application in about 2-1/2 years. To that end, the Commission outlined techniques by which the Licensing Board could "ensure prompt and efficient resolution of contested issues." Pet. App. 119a. Like the Policy Statement, the order provided that "the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances." Pet. App. 121a. The order cautioned the Licensing Board, however, not to "sacrifice fairness and sound decision-making to expedite any hearing granted on this application." Pet. App. 119a.

On August 20, 1998, the Licensing Board issued its Initial Prehearing Order setting a schedule and establishing certain procedures to be followed in the case. *See* Ct. App. JA at 42-54. NWC was ordered to file its contentions meeting the requirements of 10 C.F.R. § 2.714 on or before September 11, 1998, and a prehearing conference was scheduled for the week of October 13, 1998.

NWC reacted with a two-pronged attempt to delay the proceedings. First, NWC moved the Commission to vacate its August 19 order, arguing that the 2-1/2 year completion goal and other schedule milestones were improper and that the "unavoidable and extreme circumstances" test was inconsistent with an existing regulation, 10 C.F.R. § 2.711(a), allowing extensions of time for "good cause." The Commission denied NWC's motion, relying on its traditional authority to establish case-specific schedules and procedures,

and explaining that the "unavoidable and extreme circumstances" standard "simply gives content, under the circumstances of this case, to our rule's general 'good cause' standard" in § 2.711(a). Pet. App. 110a, n.5. The Commission reiterated its expectation that the Licensing Board would "prevent unnecessary delays and digressions, but at the same time ... ensure a fair and meaningful process." Pet. App. 104a.

The second prong of NWC's attack was a motion to the Licensing Board to postpone the prehearing conference to December 1998, and to allow the filing of contentions up to 15 days before the conference. The net result of the motion would have been more than a two-month delay in the schedule. The Licensing Board, on August 27, 1998, denied the motion because NWC had made no showing why it was unable to formulate contentions in the four-month period that had elapsed since the renewal application was filed. The Board concluded, therefore, that NWC had not shown the requisite unavoidable and extreme circumstances for a schedule extension. Pet. App. 100a. NWC appealed the Licensing Board's ruling to the Commission and argued that it "should have had, under the current schedule before the Board, until September 30, 1998 to make the required filings and to further address matters related to standing, contentions and other issues relevant to its right to participate in this proceeding ...." NWC's Petition for Review, Sept. 11, 1998, at 6-7. *See* Pet. App. 8a, 16a. The Commission disagreed with NWC's analysis, but nevertheless extended the deadline for contentions to September 30 as a matter of discretion in order "[t]o ensure that NWC has an adequate opportunity to introduce matters of safety or environmental concern into the Calvert Cliffs proceeding." Pet. App. 95a. NWC therefore obtained precisely the extension it requested.[4]

---

[4] The deadline was later extended by one more day at NWC's request because of a religious holiday. *See* Ct. App. JA at 74-78.

Thus the ultimate deadline for contentions – October 1, 1998 – gave NWC nearly six months to review the renewal application and formulate its contentions. Yet on October 1, NWC filed no contentions, nor did it seek a further extension of the deadline. Instead, NWC filed an assortment of other pleadings which made it clear that NWC did not intend to comply with the deadline for submitting contentions.[5] NWC apparently had second thoughts about its strategy, and on October 13, 1998, it submitted a "Notice of Filing" containing two purported contentions. NWC made no attempt, however, to show that it satisfied the criteria for late-filed contentions set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). Nor did the contentions provide sufficient detail to meet the basis and specificity requirements of 10 C.F.R. § 2.714(b)(2).

Given NWC's failure to meet the October 1 deadline, the Licensing Board denied its petition to intervene. Pet. App. 77a. The Commission affirmed in a comprehensive opinion on December 23, 1998. Pet. App. 47a. The Commission concluded that the scheduling orders were proper and that NWC had no excuse for ignoring them. Pet. App. 60a-63a. The Commission again explained that the "unavoidable and extreme circumstances" test was a reasonable construction of the general "good cause" standard. Pet. App. 58a. The Commission also concluded that the dispute was largely academic because NWC had never made a showing that would have satisfied *any* meaningful interpretation of the "good cause" standard. Pet. App. 59a. The extensions granted to NWC were purely a matter of discretion and not the result of any "good cause" showing by NWC. Finally, the Commission found that NWC's untimely contentions were

---

[5] NWC's pleadings are described in the Commission's opinion affirming the denial of NWC's intervention petition. Pet. App. 51a-52a. One of the documents listed "areas of concern" but explicitly stated that it was "not intended to be a filing of contentions or basis for the contentions." NWC's Status Report dated October 1, 1998, at 10 (emphasis in original).

impermissibly vague and failed to meet the established pleading requirements of 10 C.F.R. § 2.714(b). Pet. App. 69a-73a. Thus, even if the Commission had been willing to overlook the missed filing deadline, NWC's petition to intervene still would have been denied for failure to proffer any litigable contentions.

NWC sought review of the Commission's decision in the court of appeals. The original panel found in favor of NWC in a 2-1 decision written by Circuit Judge Wald and issued on November 12, 1999. Pet. App. 24a. Judge Williams dissented, but the majority opinion was issued without waiting for the dissent. *See* Pet. App. 25a n.1. A few days later, Judge Wald left the bench. On November 22, 1999, the two remaining panel members entered a *sua sponte* order vacating the court's judgment and majority opinion. Chief Judge Edwards (who originally concurred with Judge Wald) explained that "the original (now vacated) majority opinion fails to address some critical issues ... that ... were lost in our haste to issue an opinion before our colleague, Judge Wald, departed from the court." Pet. App. 21a.[6]

Another judge was selected to replace Judge Wald, and the case was rebriefed and reargued. The court issued its decision on April 11, 2000, sustaining the Commission's decision and rejecting NWC's appeal, in a unanimous opinion written by Chief Judge Edwards. Pet. App. 1a. The court held that the NRC acted well within its authority in adopting the "unavoidable and extreme circumstances" test and in setting schedules and deadlines for the proceeding. Pet. App. 10a-15a. The court also held that NWC suffered no cognizable harm from the NRC's alleged errors. The "unavoidable and extreme circumstances" test was applied only once – in the Licensing Board's August 27, 1998 order

---

[6] NWC's certiorari petition is rife with citations to and quotations from Judge Wald's opinion, often without identifying the source or warning the reader that the source is a vacated opinion. *See, e.g.*, Pet. 4, 5, 8, 9, 10, 15, 16.

denying NWC's initial motion for an extension of time. However, the Commission reversed that order and gave NWC an extension to the date NWC itself proposed. Pet. App. 16a. Moreover, NWC never made any showing that would satisfy even the "good cause" test for a further extension of time. Pet. App. 4a, 17a. Given the lack of any real prejudice to NWC, the court of appeals aptly observed that "this case appears to be much ado about nothing." Pet. App. 16a.

ARGUMENT

NWC attempts to justify certiorari by formulating legal issues concerning the interplay between the hearing requirements of the Administrative Procedure Act (APA) and the Atomic Energy Act (AEA). Those issues, however, are not actually presented by this case and were not decided (or even mentioned) by the court below. Moreover, the conflict in court decisions asserted by NWC simply does not exist. The issue *actually* presented by this case turns on a routine procedural ruling concerning scheduling in a specific case that will have little or no significance beyond the particular circumstances of this case. The case is all the more unsuitable for review here because NWC suffered no real prejudice from the procedural decision of which it complains.

I. THE ISSUES RAISED BY NWC ARE NOT ACTUALLY PRESENTED BY THIS CASE

NWC's petition focuses primarily on its Issues Nos. 1 and 2, which ask this Court to decide whether the NRC is bound to follow the formal hearing procedures of the APA, 5 U.S.C. §§ 551-58. These issues are irrelevant, and are not presented in this case, because the NRC applied its formal hearing procedures in the proceeding below, and these procedures exceed the APA's requirements.

There is no dispute that, as a general matter, the APA applies to the NRC. Indeed, § 181 of the AEA so provides. 42 U.S.C. § 2231. The question that NWC seeks to raise is

whether the APA's formal hearing requirements in 5 U.S.C. §§ 556 and 557 apply to NRC licensing proceedings. Under § 554(a), those provisions only apply to agency adjudications that are "required by statute to be determined on the record after opportunity for an agency hearing."[7] As this Court has explained, §§ 556 and 557 need be applied "only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be 'on the record.'" *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972) (quoting *Siegel v. AEC*, 400 F.2d 778, 785 (D.C. Cir. 1968)). *See also United States* v. *Florida E. Coast Ry.*, 410 U.S. 224, 237-38 (1973) (agency statute with phrase "after hearing" not sufficient to trigger APA §§ 556 and 557).[8]

The controlling agency statute in question here is section 189(a) of the AEA, 42 U.S.C. § 2239(a), which requires the NRC under certain circumstances to "grant a hearing" but does not expressly provide for a hearing "on the record." In certain types of proceedings governed by AEA § 189(a), the NRC has adopted informal hearing procedures that would not necessarily satisfy all of the formal APA hearing requirements. *See, e.g.*, 10 C.F.R. Part 2, Subpart K (expansion of spent fuel storage capacity), Subpart L (materials licenses), and Subpart M (license transfers).[9] When

---

[7] NWC also cites 5 U.S.C. § 558(c), but it is now well established that § 558(c), in and of itself, does not trigger any hearing requirements. *See, e.g., City of West Chicago v. NRC*, 701 F.2d 632, 644 (7th Cir. 1983); *Taylor v. District Engineer*, 567 F.2d 1332, 1337 (5th Cir. 1978); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1260 n.25 (9th Cir. 1977).

[8] In the *Allegheny-Ludlum* and *Florida East Coast* cases, the Court was discussing the parallel triggering provision in APA § 553 relating to rulemaking, but the analysis is equally applicable to § 554. *See Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1481-82 (D.C. Cir. 1989) (statute requiring "hearing" in an adjudication does not necessarily require formal APA "on the record" procedures).

[9] The Seventh Circuit has held that, at least with respect to a materials license proceeding, the NRC is not required to follow the APA's formal hearing requirements. *City of West Chicago v. NRC*, 701 F.2d at 641.

it comes to licensing proceedings for nuclear power plants, however, the NRC has always applied its most formal adjudicatory procedures found in Subpart G of Part 2. *See Philadelphia Newspapers, Inc. v. NRC*, 727 F.2d 1195, 1202-03 (D.C. Cir. 1984) (describing NRC's practice). And the NRC's Subpart G procedures are even more formal and rigorous than the formal APA procedures. *Compare* 10 C.F.R. §§ 2.740-2.744 (providing for discovery in Subpart G proceedings), *with Kenrich Petrochemicals, Inc. v. NLRB*, 893 F.2d 1468, 1484 (3d Cir. 1990) (APA does not confer a right to discovery); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (same). As the court below explained in another case, "the Commission's regulations governing licensing proceedings provide for hearing procedures that comport with or even surpass those required by the APA for 'on the record' adjudication." *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1445 n.12 (D.C. Cir. 1984) (*"UCS I"*).

Since the Subpart G procedures are more formal than those of the APA, the courts have not found it necessary to decide, as a theoretical matter, whether the APA formal hearing procedures might also be applicable in a power plant licensing case where the NRC is already applying its formal Subpart G procedures. The issue has surfaced occasionally, but there has been no need to resolve it because it would have had no bearing on the outcome of the case at hand. *See UCS II*, 920 F.2d at 54 n.3 (issue need not be resolved); *UCS I*, 735 F.2d at 1445 n.12 (court refrains from deciding issue); *Philadelphia Newspapers*, 727 F.2d at 1203 (issued not reached because NRC in fact applying formal procedures). The question is simply a moot point.

The NRC applies these formal Subpart G procedures to nuclear power plant license renewal proceedings, just as it does in the initial licensing of a plant. In its rulemaking proceeding establishing the license renewal process, the NRC considered what type of procedures should apply in license renewal cases, taking into account, among other things, the

memorandum from its General Counsel upon which NWC places such heavy reliance. Pet. App. 136a. The General Counsel recommended that license renewal cases should probably include some sort of formal hearings. Pet. App. 175a. He went on, however, to qualify his opinion as follows:

> That the NRC may decide to require formal, on-the-record license renewal hearings does not mean that such hearings must be conducted under the procedures of 10 C.F.R. Part 2, Subpart G, Rules of General Applicability. As noted above, it is well-recognized that the NRC's rules of practice go well beyond the procedural requirements of the APA. For example, nothing in the APA requires the extensive discovery provided for in 10 C.F.R. 2.740 through 2.744.

Pet. App. 175a. NWC argues that the General Counsel's opinion "should not be disregarded." Pet. 13. In fact, the NRC did not disregard that opinion, but went beyond it and adopted the full panoply of Subpart G procedures for license renewal cases. 56 Fed. Reg. 64,943, 64,966 (1991) (adopting 10 C.F.R. Part 54 to govern license renewals and stating that all hearings would be conducted in accordance with Subpart G).

By virtue of Subpart G, NWC got all of the procedural protections of the APA, and more. Indeed, one searches NWC's petition in vain for any material APA procedural right that it was deprived of under Subpart G. The only APA provisions cited by NWC are §§ 554(b)(3) and 558(c). *See* Pet. 15-16. NWC relies on the provision in § 554(b)(3) requiring that "[i]n fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." In § 558(c), NWC points to the phrase requiring agencies to conduct proceedings "with due regarding for the rights and privileges of all the interested

parties or adversely affected persons." [10] Neither of these provisions gives NWC anything more or different than the procedural protections of Subpart G. For example, 10 C.F.R. § 2.703(b) is in substance identical to the APA. It provides that "[t]he time and place of hearing will be fixed with due regard for the convenience of the parties or their representatives, the nature of the proceeding, and the public interest." The same philosophy is reflected throughout the NRC's Subpart G procedures. *See, e.g.*, 10 C.F.R. § 2.715a (consolidation permitted unless it "would prejudice the rights of any party"); § 2.718 (presiding officer must "conduct a fair and impartial hearing" and is directed to comply with 5 U.S.C. §§ 551-558); § 2.740(d) (discovery orders must consider "convenience of parties and witnesses"); § 2.756 (informal procedures encouraged if consistent with 5 U.S.C. §§ 551-558); App. A, ¶ I(b) (in fixing time and place of conferences, "due regard shall be had for the convenience and necessity of the parties").

In this case, NWC enjoyed procedural protections under Subpart G surpassing those provided by the APA. Accordingly, there was no need for the court below to decide whether the less formal provisions of the APA might also apply. That was a purely academic question immaterial to the outcome of the case. The court of appeals did not decide the issue and indeed did not even mention it. This Court does not ordinarily consider immaterial issues that were never

---

[10] These provisions are so general in nature that they are little more than platitudes which every adjudicatory body no doubt would embrace. That presumably explains why the provisions have rarely been applied by the courts to assess the validity of agency action. One such case (and perhaps the only one) is *Burnham Trucking Co. v. United States*, 216 F. Supp. 561 (D. Mass. 1963) (3-judge court), in which the statutory predecessor of § 554(b)(3) was applied to sustain the agency's refusal to postpone a scheduled hearing. The court correctly observed that the matter of continuances lies within the agency's discretion and will not be disturbed except upon a "clear showing of abuse." 216 F. Supp. at 564 (citation omitted).

addressed in the court below. *See NCAA v. Smith*, 525 U.S. 459, 470 (1999); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121-22 (1994). There may be some case in which it really matters whether the APA hearing procedures apply to an NRC adjudication.[11] This is not such a case.[12]

Issue No. 3 raised by NWC attacks the NRC's construction of the "good cause" criteria in 10 C.F.R. § 2.711 to require "unavoidable and extreme circumstances." This issue, like the others, is not actually presented here because, as the court below held, the "unavoidable and extreme circumstances" test never caused any prejudicial injury to NWC. Pet. App. 16a-17a. The Commission reversed the only application of that standard and, as a matter of discretion, gave NWC precisely the extension it sought. Pet. App. 94a. Since the new standard was never applied, its validity is at most a theoretical abstraction unsuitable for review here. Moreover, the adoption of the new standard is also immaterial in this case because NWC never made any showing that would have satisfied even the "good cause" standard, as both the Commission (Pet. App. 59a) and the court of appeals (Pet. App. 4a) held. Thus, NWC's third issue is, on the facts of this case, purely academic.

---

[11] It might make a difference in a materials license case, for example, because the NRC uses less formal procedures in such cases. That is why the Seventh Circuit found it necessary to decide the APA question in the *City of West Chicago* case.

[12] NWC argues that the present case is important in light of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Pet. 11, 14. *Vermont Yankee* is of no help to NWC. That case held that the courts may not impose procedures on administrative agencies that go beyond statutory requirements. The Court did not address the question of when agencies are subject to the APA's formal hearing requirements. *Vermont Yankee* is relevant, however, insofar as it makes clear that intervenors have a duty to participate cooperatively in NRC proceedings, and to present their contentions clearly and understandably. 435 U.S. at 553-54.

Finally, even if the third issue were presented, it would still be an unlikely candidate for Supreme Court review, given that it involves a routine application of settled principles of administrative law. The court of appeals was clearly correct when it sustained the Commission's adoption and application of the "unavoidable and extreme circumstances" standard. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974). It is beyond dispute that the NRC has broad discretion to set schedules and control its cases. The Commission's regulations expressly give its Licensing Boards that authority. *See* 10 C.F.R. §§ 2.711, 2.718. It is also clear that the NRC, like any administrative agency, always has inherent power to "modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." *American Farm Lines v. Black Bull Freight Serv.*, 397 U.S. 532, 539 (1970). *See also Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 762 (1973) (courts should not "unduly limit the discretion the Commission must have in order to mold its procedures to the exigencies of the particular case.") The agency's discretion necessarily extends to matters of scheduling and docket control. As the court of appeals held in *UCS II*, the NRC "can certainly adopt a pleading schedule designed to expedite its proceedings." 920 F.2d at 55. And it is recognized that the NRC has broad authority to "to control its own proceedings" and to set and enforce deadlines even where they result in what an intervenor may consider to be "a truly impossible schedule." *Carstens v. NRC*, 742 F.2d 1546, 1559 (D.C. Cir. 1984).

The lower court carefully analyzed the issues and concluded that the NRC acted properly in all respects when it adopted the "unavoidable and extreme circumstances" test as a case-specific refinement of the good cause standard; that NWC was on clear notice of the refined test; and that the agency action here was neither arbitrary nor capricious. Pet. App. 10a-15a. The procedural orders in this case were well within the NRC's discretion. NWC cites no case anywhere in its petition suggesting that the lower court's analysis was

incorrect, and indeed the third issue is barely addressed in the petition. Certiorari is unwarranted.

II. THERE IS NO CONFLICT AMONG THE COURTS

NWC argues that there are "troubling ambiguities" and "conflicting decisions" among the courts and the NRC on the APA issues discussed above. Pet. 18-23. In fact, there is no such conflict, as the four cases cited by NWC demonstrate.

The *City of West Chicago* case (Pet. 19) held that the APA's formal hearing requirements are not applicable in a materials license proceeding. 701 F.2d at 641-45. No other case has held to the contrary. *Siegel* (Pet. 19) held that the APA does not require an adjudicatory hearing when the NRC conducts a rulemaking. 400 F.2d at 785-86. That holding remains uncontradicted and was cited with approval in this Court's *Allegheny-Ludlum* opinion, 406 U.S. at 757, and in the D.C. Circuit's later *Philadelphia Newspapers* opinion, 727 F.2d at 1203. *UCS I* (Pet. 20-21) found it unnecessary to decide whether the APA's formal hearing requirements apply to power plant licensing proceedings, given that the NRC's own procedures meet or exceed APA requirements. 735 F.2d at 1445 n.12. *UCS II* reached the same conclusion for the same reason. 920 F.2d at 53 n.3. *UCS I* and *UCS II* do not conflict with each other, nor with any of the other cases cited by NWC. And it bears repeating that *this* case certainly does not create a conflict because it did not address the issue at all. There simply is no conflict.[13]

NWC also complains that a footnote in one NRC opinion is inconsistent with the courts' decisions. Pet. 18, 23-25. In that footnote (Pet. App. 60a n.4), the Commission was responding to NWC's argument that the APA required the NRC to give due regard to the "rights and privileges" and the

---

[13] Even if there were some sort of a conflict among *Siegel*, *UCS I*, *USC II* and this case, it would be an intracircuit conflict best resolved by the D.C. Circuit itself. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

"conveniences and necessities" of the parties. The Commission readily conceded its "obligation to treat all parties to our proceedings fairly." The Commission also went on to point out, "as a formal matter," that it took the position that its licensing proceedings are not governed by the APA requirements for formal hearings. The Commission's aside on this legal issue was not the rationale for its decision and had no bearing on the outcome of the case. It hardly merits Supreme Court review, especially where there is no conflict among the courts on the issue and NWC was actually accorded formal procedures surpassing those of the APA. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (conflicts should be resolved only "in the context of meaningful litigation," not when issue is posed "abstractly").

III. THE ISSUE ACTUALLY PRESENTED HERE INVOLVES A ROUTINE PROCEDURAL RULING WITH LITTLE SIGNIFICANCE BEYOND THE PARTICULAR CIRCUMSTANCES OF THIS CASE

The issue actually presented here is whether the NRC properly denied NWC's intervention petition when it failed to file its contentions by the prescribed deadline. The issue turns on the particular facts and circumstances of the case and will have little or no impact on other NRC cases or on administrative law in general. NWC nevertheless claims that the case is important because it is the first license renewal case and may set a precedent making it difficult for intervenors to participate meaningfully in other such cases. Pet. 17-18. The record does not support NWC's claim.

The schedule in this case gave NWC an ample opportunity to participate meaningfully in the proceedings. NWC had 176 days from the filing of the renewal application to the contention deadline. That was more than enough time for a diligent intervenor to review the application, retain any necessary experts, and formulate contentions. And it should

be kept in mind that NWC was not required to submit and prove its entire case at the end of the 176-day period. It was merely required to file contentions at that time. After that, there would have been a period of 6-12 months for further prehearing procedures, including discovery; completion of the NRC Staff's Safety Evaluation Report and Final Environmental Statement; submission of additional contentions based on the Staff reports; and preparation of testimony and evidence for the evidentiary hearing. *See* Pet. App. 120a. This was not a rush to judgment, but a deliberate process expected to take 2 ½ years.

The Commission held as a matter of fact that NWC had ample time to develop contentions (Pet. App. 63a), and the court of appeals agreed (Pet. App. 13a-14a).[14] There is no need for a further review of that factual determination in this Court. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981). Nor is it plausible that the result in this case will adversely affect public participation in other renewal cases. Other intervenors in other cases will have no cause for complaint if they are treated exactly the same as NWC.

Another singular feature of this case is that when NWC eventually filed contentions well after the deadline, they proved to be so vague and insubstantial that they failed to meet the NRC's pleading requirements. The Commission so held. Pet. App. 69a-73a. Even if the Commission had overlooked the untimeliness, NWC still would have been denied intervention for failure to submit admissible contentions. This is an alternative ground for affirmance independent of the schedule-related issues that NWC seeks to raise in this Court. Accordingly, review of the issues tendered

---

[14] The court also pointed out that NWC had ample time if counted from the July 8, 1998 notice of opportunity for hearing. From that point, NWC had 85 days, compared to the normal 75-day default period that would apply under NRC procedures in the absence of a scheduling order. Pet. App. 13a.

by NWC would likely be futile because the alternative ground which NWC has not asked the Court to review – would still require affirmance of the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

David R. Lewis
Counsel of Record

SHAW PITTMAN
2300 N Street, N.W.
Washington, D.C. 20037-1128
Telephone: (202) 663-8474

Attorney for Respondent
Calvert Cliffs Nuclear Power Plant, Inc.

November 20, 2000

Supreme Court, U.S.
FILED
DEC 11 2000
CLERK

(3)

No. 00-422

IN THE

Supreme Court of the United States

NATIONAL WHISTLEBLOWER CENTER,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

Stephen M. Kohn
Counsel of Record
National Whistleblower Legal
Defense and Education Fund
3233 P Street, N.W.
Washington, D.C. 20007
(202) 342-1903 (Phone)
(202) 342-6984 (Fax)

December 2000

TABLE OF CONTENTS

Table of Authorities i

Introduction 1

Argument 2

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Con-Edison of New York, Inc. v. PSC of New York,
447 U.S. 530, 100 S.Ct. 2326 (1980) 8

In the Matter of Duke Energy Corporation,
No. LBP-98-33 (Dec. 29, 1998) 9

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238, 104 S.Ct. 615 (1984) 8

Stone v. I.N.S.,
514 U.S. 386, 115 S.Ct. 1537 (1995) 9

Union of Concerned Scientists v. N.R.C.,
735 F.2d 1437 (D.C. Cir. 1984) 6

Vermont Yankee Nuclear Power Corp. v. N.R.D.C.,
435 U.S. 519, 98 S.Ct. 1197 (1978) 1, 5, 7, 8

TABLE OF AUTHORITIES – Continued

Statutes, Rules and Regulations:

5 U.S.C. §§ 551-558 1

5 U.S.C. § 554 ..... 2, 5

5 U.S.C. § 554(b)(3) 2

42 U.S.C. § 2011 8

10 C.F.R. Part 2, Subpart G 6

Supreme Court Rule 10(c) 9, 10

Miscellaneous:

63 Fed. Reg. 41,872 (1998) 8

Other Authorities:

Layton, "Nuclear Plants Watching Calvert Cliffs License Bid," *The Washington Post*, p. 1A (April 1, 1999) 9

PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondents' contention that the critical issues presented in this petition are not justiciable is completely without merit. This case squarely raises an extremely important federal question that this Court should resolve.

Respondents' contentions are baseless and without merit, for several reasons. First, the Respondents are simply wrong in their argument that the questions presented here were not a part of this case below. The very key questions here, *i.e.*, whether the Administrative Procedure Act, 5 U.S.C. §§ 551-558 governs the Nuclear Regulatory Commission's ("NRC's") conduct of adjudicatory proceedings, and whether the NRC is free to adopt interpretations of its regulations that cause its procedures to fall below the safeguards set forth therein, are very squarely before this Court.

Second, the Respondents fail to recognize the "concerns" that guided the Court's grant of *certiorari* in *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 525, 98 S.Ct. 1197, 1202 (1978). Because the same types of concerns are present here, the Court should grant *certiorari* and review the Court of Appeals' decision in this case.

Third, the NRC's holding below, that the Administrative Procedure Act's rules governing adjudications are inapplicable to nuclear safety proceedings, will perpetuate harm to the public's ability to participate in scores of nuclear power plant license renewal proceedings in the future.

ARGUMENT

Petitioner raised the questions presented in this case below. In the administrative proceeding before the NRC, as well as in both rounds of briefing and argument before the Court of Appeals, a central argument raised by Whistleblowers centered on the NRC's failure to follow 5 U.S.C. § 554 and how that failure prejudiced the public's right to meaningfully participate in NRC safety proceedings. When Respondent Calvert Cliffs suggests to the Court that the questions presented here were not presented below, it is wrong.

On August 19, 1998, the NRC's "Commission" issued an order in the administrative proceeding below in which it referred Whistleblowers' intervention petition to an Atomic Safety and Licensing Board Panel ("ASLB") for adjudication. *See* App. 115a. In its order, the NRC Commission directed the ASLB to, *inter alia*, grant extensions of time only upon a showing of "unavoidable and extreme" circumstances and to establish a timetable for adjudication with rigid time parameters and which did not truly allow for the unique and extensive scientific and public health and safety questions that were likely to arise. App. 36a.

Upon notice of the Commission's order, Whistleblowers immediately objected to this direction on the grounds that it violated, *inter alia*, the Administrative Procedure Act, 5 U.S.C. § 554. App. 105a. Whistleblowers primarily relied on 5 U.S.C. § 554(b)(3), which requires agencies in formal adjudications to give due regard for the conveniences or necessities of the parties or their representatives in fixing the time and place of a hearing. App. 126a.

Whistleblowers made the point that where, as here, the agency was dealing with the very first license renewal proceeding of its kind, it was manifestly unreasonable to believe that the public could meaningfully participate without APA-type safeguards in place to allow for searching and reasoned review of the complex scientific and technical documents at issue.[1/]

Whistleblowers raised this objection throughout the proceeding below, and the Commission ultimately dismissed that aspect of Whistleblowers' argument as it affirmed the ASLB's denial of Whistleblowers' petition to intervene. App. 60a-61a, n. 4. Whistleblowers then specifically raised the question of the APA's applicability to NRC licensing proceedings and whether the NRC's "unavoidable and extreme" circumstances test comports with the APA's

---

[1/] Respondent Calvert Cliffs Nuclear Power Plant ("Calvert Cliffs") suggests that Whistleblowers got "all of the procedural protections of the APA and more." *See* Brief in Opposition For Respondent Calvert Cliffs, p. 11. However, as the record clearly demonstrates, Whistleblowers never received meaningful consideration of their request for a reasonable time to allow its experts to study the license renewal application in question. Specifically, it is uncontested that under the prior rules applicable to nuclear safety proceedings, Whistleblowers would have obtained an enlargement of time to obtain proper expert advise. App. 35a-36a. The "starter's pistol" argument, *i.e.*, that Whistleblowers could have begun preparing at the very moment the license application became publicly available, *see, e.g. id.* at 2, n. 3; Brief For the Federal Respondents in Opposition, at 16-17, is unavailing and ignores the fact that under the prior APA-consistent regulations, the "starter's pistol" argument would have failed. *Id.*, App. 35a-36a.

requirements to the Court of Appeals. For example, on June 14, 1999 Whistleblowers filed their main "Brief" before the Court of Appeals. That brief contained an entire section dedicated to the harm caused to Whistleblowers as a result of the NRC's failure to follow the APA adjudicatory rules. In part, Whistleblowers stated as follows to the Court of Appeals:

> The Commission . . . erroneously held that the APA was not fully applicable to the Calvert Cliffs proceeding. Even assuming that the Commission was not bound by its published regulations, the Commission was not vested with unlimited "broad regulatory latitude" to establish its "own rules of procedure." The Commission was required to adhere to the adjudicatory requirements of the APA when it evaluated each and every procedural request filed by the [National Whistleblower] Center. The NRC's failure to carefully analyze its rulings pursuant to the APA mandates that this case be remanded in order for the Commission to re-evaluate its procedural rulings in light of the APA's requirements.

Petitioner's Brief to the U.S. Court of Appeals for the D.C. Circuit, pp. 40-41 (June 14, 1999).

Even when requested to re-brief some issues by the D.C. Circuit, Whistleblowers still raised their APA argument:

> A critical, yet unobtrusive measure that agencies must provide when conducting hearings on the record is that "in fixing the time and place for hearings, due regard shall be had

> for the convenience and necessity of the parties or their representatives." 5 U.S.C. § 554(b)(3). Thus, regardless of whether the Commission was applying substantive or procedural rules...the NRC was statutorily mandated to take into consideration the "necessities and conveniences" of Whistleblower when ruling on the timing issues. *This statutory rule limits the* discretion of all agencies to apply prejudicial procedural rules . . . .

Petitioner's Supplemental Brief filed before the Court of Appeals for the D.C. Circuit, p. 19 (January 21, 2000).

On November 12, 1999, the Court of Appeals issued its first decision in this matter, which was in Whistleblowers' favor. In her majority opinion, Judge Wald did not reach the APA issue presented in this petition. Instead, she ordered the NRC to adhere to its long-standing "good cause" test which was *consistent* with the standards set forth in 5 U.S.C. § 554. Judge Wald held that the NRC's swerve, from a "good cause" to an "unavoidable and extreme circumstances" test, was impermissible because it deviated from long-established precedent. App. 46a. Accordingly, under Judge Wald's opinion, the NRC was required to provide applicants for intervention, such as Whistleblowers, procedures in line with its published regulations, which meet the APA's protections.[2/]

[2/] The Court may consider whether a totally unjustified departure from well-settled NRC procedures of long standing might "require judicial correction." *Vermont Yankee*, 435 U.S. at 542, n. 17, 98 S.Ct. at 1211, n. 17. Though the issue was not squarely before the Court in *Vermont Yankee*, the Court (continued...)

Specifically, in a prior case, Judge Wald noted that the NRC's published regulations were consistent with the APA rules on adjudications. *Union of Concerned Scientists v. N.R.C.*, 735 F.2d 1437, 1444, n. 12 (D.C. Cir. 1984).

In one sense, Respondents are partially correct. They argue that the NRC's "Subpart G" procedures exceed the APA's requirements, and that the "full panoply" of those procedures are extended to licensing procedures. Brief in Opposition for Respondent Calvert Cliffs, p. 11. This case illuminates the practical problem with that argument, which will now be repeated in all future licensing cases. To wit, those "Subpart G" rules that Respondents rely upon expressly call for extensions of time where "good cause" merits. That standard unquestionably meets the APA's requirements on its face.

The problem, then, is not that the NRC's regulations violate the APA, which is what the Respondents would have this Court believe the Whistleblowers are arguing. Whistlebowers are not. Rather, the problem is that when the NRC swerved from its published regulations and imposed the "unavoidable and extreme circumstances" test it facially violated its own regulations, thus causing it to dip below the statutory minima required by the APA. This standard, notwithstanding the NRC's published procedures, unquestionably fails to meet the APA's requirements. Moreover, the lower courts holding that the NRC did not have to provide notice and comment regarding revisions to their

---

[2/](...continued)
indicated that such review might be proper under appropriate circumstances. On the record here, the Court could fairly conclude that this question is included within the questions presented by Whistleblowers.

published procedural regulations fails to address the critical issue raised in this petition.

The wrinkle in this case occurred on November 22, 1999, when, after Judge Wald had left the Court of Appeals, the remaining two judges vacated her Order *sua sponte* and scheduled the case for re-argument. App. 21a. Thereupon, the Court of Appeals never again addressed or resolved the question of APA applicability, though Whistleblowers again raised it. Instead the Court veered off onto an excursion through whether the "unavoidable and extreme circumstances" test was a "procedural" or "substantive" rule. *Id.*

Therefore, the questions presented here, raised and argued by Whistleblowers throughout the proceedings below, are squarely before this Court.

In *Vermont Yankee*, this Court granted *certiorari* where the Court of Appeals erroneously required the NRC to give procedures above and beyond those required by the APA, "because of our concern that they had seriously misread or misapplied this statutory and decisional law cautioning reviewing courts" against holding federal agencies to higher standards than the APA requires. *See Vermont Yankee*, 435 U.S. at 525, 98 S.Ct. at 1202.[3/]

[3/] That *Vermont Yankee* is a rulemaking case is irrelevant at this stage of this adjudication case where the question is whether *certiorari* review is proper. Moreover, the outcome of *Vermont Yankee*, where the adequacy of agency procedures was at issue, does not suggest a similar outcome here, because the *Vermont Yankee* court made the point that adjudications, which are at issue here, are normally associated with the "full

(continued...)

The very same principles are at stake here. First, the "unavoidable and extreme circumstances" test in question will unquestionably apply to all future license renewal application proceedings. *See* 63 Fed. Reg. 41,872 (1998). Without question, these license renewal proceedings constitute the most important safety proceedings pending before the agency, and will have direct impact on the public's right to adjudicate major safety issues at nuclear power plants throughout the United States.

This Court has noted the public interest in nuclear safety. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 279, 104 S.Ct. 615, 637 (1984) (mentioning public interest in nuclear safety); *Con-Edison of New York, Inc. v. PSC of New York*, 447 U.S. 530, 100 S.Ct. 2326 (1980) (same). *See also* 42 U.S.C. § 2011 (declaring the regulation of nuclear power to be in the public interest). This Court has also noted the importance of ensuring that nuclear safety proceedings adhere to the requirements of the APA. *Vermont Yankee*, 435 U.S. 519 (1978).

Just as the Court in *Vermont Yankee* reviewed the Court of Appeals decision in order to protect the NRC from the Court of Appeals, and not allow the Court of Appeals to "engraft upon it" procedures above and beyond the APA's requirements, the Court should now act here. Where the Court of Appeals has failed to ensure that the NRC's procedures do not fall below the floor established by the APA, thus presenting the flip side of the *Vermont Yankee* coin, this Court should step in to protect the public's interest.

[3/](...continued)
panoply" of procedural devices. *Vermont Yankee*, 435 U.S. at 437, 98 S.Ct. at 1213.

Significantly, this case will specifically affect the public participation in nuclear plant license renewal cases, because "operators of plants around the country are watching the Calvert Cliffs case." Cert. Petition at 17, *citing* Layton, "Nuclear Plants Watching Calvert Cliffs License Bid," *The Washington Post*, p. 1A (April 1, 1999). In fact, the NRC's "unavoidable and extreme circumstances" test, first used in this case, has already been used in at least one other license renewal case where potential intervenors could not formulate contentions in time and were turned away, *see In the Matter of Duke Energy Corporation*, Memorandum and Order (LBP-98-33), ASLBP Dec. 29, 1998, and no group of intervenors has been successful to-date in formulating contentions and reaching the hearing stage in any of the license renewal proceedings that have occurred.

Moreover, the Respondents argue that there is no split among the circuits to justify review. Even if this Court agrees with Respondents that there is not a circuit split, it should find that this case squarely falls into the category of cases in which *certiorari* is permissible pursuant to Supreme Court Rule 10(c). Likewise, this case arises from the D.C. Circuit, which rules upon an overwhelming number of administrative law and NRC cases, and is clearly the leader among the federal circuits in this area. *See, e.g., Stone v. I.N.S.*, 514 U.S. 386, 404, 115 S.Ct. 1537, 1548 (1995) (calling D.C. Circuit the circuit with the "most experience" reviewing agency decisions). Correction of erroneous opinions of the D.C. Circuit is, therefore, on a par with correcting inter-circuit conflicts which have the potential to affect a large number of interested parties.

This Court granted *certiorari* in *Vermont Yankee* in order to correct the D.C. Circuit where its leadership among the circuits threatened to create a precedent which would interfere

with agencies' ability to function efficiently. Doing so was fully within the Court's discretion, and was fully consonant with Supreme Court Rule 10(c). This Court should do the same here where the D.C. Circuit's leadership threatens the ability of the public to participate in a meaningful way in proceedings involving important questions of public safety.

CONCLUSION

For the foregoing reasons, this Court should grant the Whistleblowers' Petition for *Certiorari* in order to finally resolve whether the APA applies to adjudications brought under the Atomic Energy Act.

Respectfully submitted,

Stephen M. Kohn
Counsel of Record
Michael D. Kohn
David K. Colapinto
National Whistleblower Legal Defense & Education Fund
3233 P Street, N.W.
Washington, D.C. 20007
(202) 342-1903
(202) 342-6984 (Fax

December 2000

Supreme Court, U.S.
FILED
NOV 20 2000
CLERK

No. 00-422

In the Supreme Court of the United States

NATIONAL WHISTLEBLOWER CENTER, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KAREN D. CYR
General Counsel
JOHN F. CORDES, JR.
Solicitor
E. LEO SLAGGIE
Special Counsel of the Solicitor
MARJORIE S. NORDLINGER
Senior Attorney
Nuclear Regulatory Commission
Washington, D.C. 20555

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
MARK HAAG
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Nuclear Regulatory Commission erred in denying petitioner's application to intervene in a nuclear power plant license renewal proceeding, when petitioner had notice of the rules governing such proceedings and failed to meet the twice-extended deadline for filing its contentions.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	17

TABLE OF AUTHORITIES

Cases:

American Farm Lines v. *Black Ball Freight Serv.*, 397 U.S. 532 (1970)	15
City of W. Chicago v. *NRC*, 701 F.2d 632 (7th Cir. 1983)	9, 13, 15
JEM Broad. Co. v. *FCC*, 22 F.3d 320 (D.C. Cir. 1994)	10
Lincoln v. *Vigil*, 508 U.S. 182 (1993)	15
NCAA v. *Smith*, 525 U.S. 459 (1999)	14
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974)	15
Nuclear Info. Res. Serv. v. *NRC*, 969 F.2d 1169 (D.C. Cir. 1992)	12
Peralta v. *Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988)	14
Philadelphia Newspapers, Inc. v. *NRC*, 727 F.2d 1195 (D.C. Cir. 1984)	12
Union of Concerned Scientists v. *NRC*:	
735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985)	12
920 F.2d 50 (D.C. Cir. 1990)	12
Vermont Yankee Nuclear Power Corp. v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978)	11, 15

Statutes and regulations: Page

Atomic Energy Act, 42 U.S.C. 2231 11
Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.* 2
§ 103, 42 U.S.C. 2133 2
§ 103(c), 42 U.S.C. 2133(c) 2
§ 104, 42 U.S.C. 2134 2-3
5 U.S.C. 553(b)(3)(A) 15
5 U.S.C. 554 12
5 U.S.C. 554(b) 13
5 U.S.C. 556 12
5 U.S.C. 556-557 12
5 U.S.C. 557 12
5 U.S.C. 706 16
10 C.F.R.:
Pt. 2:
Subpt. G 4, 12
Section 2.105 ..... 4, 12
Section 2.700 ..... 4, 12
Sections 2.700-2.788 12
Section 2.711(a) 6
Section 2.714(b)(2)(iii) 5
Pt. 50:
Section 50.51(a) 3
Pt. 54:
Section 54.27 4

Miscellaneous:

51 Fed. Reg. 40,334 (1986) 3
53 Fed. Reg. 32,919 (1988) 3
55 Fed. Reg. 29,043 (1990) 3
56 Fed. Reg. (1991):
p. 64,943 3
p. 64,963 3
60 Fed. Reg. 22,461 (1995) 3
63 Fed. Reg. (1998):
p. 41,872 4

Miscellaneous—Continued:

	Page
p. 41,873	4
p. 41,874	4
H.R. Rep. No. 581, 105th Cong., 2d Sess. (1998)	4
Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18 (1998)	4

In the Supreme Court of the United States

No. 00-422

NATIONAL WHISTLEBLOWER CENTER, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The April 11, 2000, opinion of the court of appeals (Pet. App. 1a-19a) is reported at 208 F.3d 256. The vacated November 12, 1999, opinion of the court of appeals (Pet. App. 24a-46a) is unreported. The final decision of the Nuclear Regulatory Commission (Pet. App. 47a-76a) is reported at 48 N.R.C. 325.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2000. A petition for rehearing was denied on June 15, 2000. The petition for a writ of certiorari was filed on September 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent United States Nuclear Regulatory Commission (NRC or Commission) is responsible for, among other matters, maintaining a regulatory program governing the safe construction and operation of commercial nuclear power reactors in this country. To accomplish its mission, the Commission issues licenses, rules, and orders covering various safety and environmental subjects. This action arose out of an application by the Baltimore Gas & Electric Company[1] to renew its NRC-issued licenses to operate the Calvert Cliffs nuclear power plant in Maryland.

1. The Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, embodied Congress's resolve to let the private sector play the lead role in providing energy from nuclear fission for commercial and other non-military uses. To further this goal in a manner protective of public health and safety and the common defense and security, Section 103 of the Act, 42 U.S.C. 2133, establishes licensing requirements for commercial nuclear reactors. Pursuant to subsection 103(c), reactor licenses are "issued for a specified period * * * depending on the type of activity to be licensed." For licenses to operate nuclear reactors, Congress established 40 years as the maximum allowable period. Section 103(c) further provides that operating licenses "may be renewed upon the expiration of such period." The statutory 40-year period does not govern plants (such as Calvert Cliffs) that are licensed for "research

---

[1] Baltimore Gas and Electric Company was a party-respondent before the court of appeals. Subsequently, as a result of a corporate reorganization, Calvert Cliffs Nuclear Power Plant, Inc., became owner and operator of the Calvert Cliffs nuclear power plant, and is a respondent in this Court.

and development." 42 U.S.C. 2134. But an NRC rule imposes the same 40-year limit on operating licenses for such plants. See 10 C.F.R. 50.51(a).

In 1982, the NRC staff convened a workshop to identify and resolve issues related to plant aging. The issues to be addressed included, among others, the timing for resolution of policy, technical, and procedural issues, the earliest and final dates that would be appropriate for filing an application to renew a license, and procedural changes that would be necessary to consider renewal applications. See 51 Fed. Reg. 40,334 (1986). The Commission ultimately decided to proceed by rulemaking and published an Advance Notice of Proposed Rulemaking seeking public comment on an NRC publication, "Regulatory Options for Nuclear Plant License Renewal," NUREG-1317. See 53 Fed. Reg. 32,919 (1988).

After conducting numerous public conferences, meetings, and workshops with interested parties, the NRC issued a proposed rule. See 55 Fed. Reg. 29,043 (1990). In 1991, the Commission published a final rule providing procedures and standards for license renewals. See 56 Fed. Reg. 64,943 (1991), codified as 10 C.F.R. Pt. 54. Four years later, after another rulemaking proceeding, the Commission modified its rule in some respects. See 60 Fed. Reg. 22,461 (1995). The final rule provided that licensees could seek renewal up to 20 years before license expiration. See 56 Fed. Reg. at 64,963. This lead time recognized that public utility licensees would need 10 to 14 years to plan and build replacement power plants in the event that the NRC refused to renew a license for a currently operating nuclear plant. *Ibid.*

The Commission's License Renewal Rule requires notice in the Federal Register of the opportunity for a

hearing on an application for license renewal. 10 C.F.R. 54.27. The license renewal hearing is a formal adjudication conducted before a three-judge Atomic Safety and Licensing Board, and is governed by the Commission's rules of practice, 10 C.F.R. Pt. 2, Subpt. G. See 10 C.F.R. 2.105, 2.700. In view of the anticipated large number of license renewal applications, and in response to recent experience and criticism of its procedures from Congress (see H.R. Rep. No. 581, 105th Cong., 2d Sess. 135 (1998)), the Commission issued a policy statement in July 1998, announcing its intention to modify procedures for license renewal hearings. See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 N.R.C. 18 (1998), *reprinted at* 63 Fed. Reg. 41,872 (1998).

The Commission's policy statement observed that "the opportunity for hearing should be a meaningful one." 63 Fed. Reg. at 41,873. But it recognized that "applicants for a license are also entitled to a prompt resolution of disputes concerning their applications." *Ibid.* Accordingly, the Commission encouraged hearing boards and officers to use "current rules and policies" as a "means to achieve a prompt and fair resolution of proceedings," and to "establish schedules for promptly deciding the issues * * *, with due regard to the complexity of the contested issues and the interests of the parties." *Ibid.* To accomplish those objectives, the policy statement stated that requests for extensions of time should be granted only "when warranted by unavoidable and extreme circumstances." *Id.* at 41,874.[2]

---

[2] The policy statement also addressed the requisite contentions of those seeking NRC hearings. 63 Fed. Reg. at 41,874. The Commission explained that in earlier cases and in a 1989 rulemaking it

2. a. In April 1998, Baltimore Gas & Electric Company asked the NRC to renew its current licenses to operate the Calvert Cliffs nuclear power plant. Pet. App. 4a, 47a. The Commission promptly published notice of the application and, in July 1998, published notice of an opportunity for third parties to intervene and seek a formal hearing on the renewal application. *Id.* at 4a-5a, 49a. Only one potential intervener, petitioner, sought a hearing. The petition to intervene was filed shortly after the NRC issued its policy statement specifying that extensions would be allowed only in "unavoidable and extreme circumstances." *Id.* at 6a.

b. In August 1998, the Commission referred petitioner's hearing request to the NRC's Licensing Board. Pet. App. 6a, 49a. The referral order gave the Board a proposed schedule with a goal of resolving the Calvert Cliffs proceeding within about two and one half years, outlined a number of case management tools it expected the Board to employ—including a directive not to grant extensions of time "absent unavoidable and extreme circumstances"—and called attention to the Commission's recent policy statement on expediting cases. *Id.* at 6a, 115a-122a. The Licensing Board immediately issued an initial prehearing order giving petitioner three weeks, until September 11, 1998, to file the required contentions detailing its concerns. *Id.* at 6a, 50a. The order stated that any extension requests should be

---

had made clear that to obtain a hearing potential interveners must support their contentions with specificity, and could not rest on mere conclusory assertions. See *ibid.* (citing 10 C.F.R. 2.714(b)(2)(iii)). At the same time, however, the Commission stated that the "factual support necessary" to show that a genuine dispute exists "need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion." *Id.* at 41,874 n.1.

submitted at least three business days prior to the due date and "demonstrate 'unavoidable and extreme circumstances.'" *Id.* at 6a.

Petitioner filed a series of motions with the Board and the Commission, arguing that the Commission's policy statement, referral order, and hearing schedule unfairly restricted the time to frame its contentions. Pet. App. 6a-8a, 50a-51a. In particular, petitioner argued that requests for extensions should be governed by the "good cause" standard set forth in 10 C.F.R. 2.711(a). Pet. App. 7a. The Commission found the challenged procedural orders well within the agency's power to manage its own docket and denied petitioner's motions. In particular, the Commission concluded that the unavoidable-and-extreme circumstances standard "simply gives content . . . to [the] rule's general 'good cause' standard." *Ibid.* (quoting NRC order). The Licensing Board denied petitioner's request for an extension of time, finding that petitioner had failed to demonstrate unavoidable and extreme circumstances warranting an extension. *Ibid.*

Petitioner did not file any contentions on September 11, 1998—the deadline for doing so. Instead, it filed a petition with the Commission objecting to the denial of its request for extension and arguing that the deadline should be September 30, 1998. While standing by the extreme-and-unavoidable-circumstances standard, the Commission nevertheless agreed to give petitioner an extension until September 30 to file the requisite contentions. Pet. App. 94a-97a, 103a-114a. The Board subsequently gave petitioner an additional extension of one day, until October 1, 1998, in recognition of a religious holiday. *Id.* at 8a, 51a. The October 1 deadline came and went with no contentions filed. *Id.* at 8a, 51a. On October 13, 1998, petitioner filed two late conten-

tions relying on references to NRC staff inquiries to Baltimore Gas and Electric Company. *Id.* at 9a, 52a. The Board dismissed the petition to intervene on the grounds that petitioner failed "to establish cause" for an extension and failed to show that it met the standard for late-filed contentions. *Id.* at 9a, 77a-93a.

c. On administrative appeal, the Commission affirmed. Pet. App. 47a-76a. The Commission found that petitioner had "had more than five months [from the filing of the license renewal application] within which to prepare contentions, yet it offered no meaningful explanation of the grounds for its opposition" to the Calvert Cliffs license renewal. *Id.* at 59a. In response to petitioner's argument that it should have received additional time under the Commission's "good cause" standard, the Commission indicated that it considered its "construction of 'good cause' to require a showing of 'unavoidable and extreme circumstances' * * * a reasonable means of avoiding undue delay in this important license renewal proceeding." *Id.* at 58a. The Commission further found that petitioner's "complete failure to provide specific information about its concerns precluded any finding that 'good cause,' in a meaningful sense, justified [petitioner's] requested extensions of time." *Id.* at 59a. The Commission also agreed that petitioner's contentions were insufficient. *Id.* at 69a-73a.

3. a. Petitioner filed a petition for review of the Commission's order with the District of Columbia Circuit. A divided panel of the court of appeals (Pet. App. 24a-46a) held that the Commission's unavoidable-and-extreme circumstances standard "is effectively an amendment of the Commission's regulations made without notice and comment required by the Administrative Procedure Act." *Id.* at 25a. The panel vacated

the Commission's decision and remanded for consideration of "whether [petitioner] had 'good cause' for an extension of time to file contentions." *Id.* at 46a. Ten days later, however, the court of appeals (*id.* at 20a-23a) on its own motion vacated the divided panel decision and set the case for further briefing and rehearing.

Chief Judge Edwards, who had joined the initial panel decision, concurred in rehearing because he "fear[ed] that the original (now vacated) majority opinion fails to address some critical issues in this case." Pet. App. 21a. As he explained, "[t]hese issues were not the focus of the arguments during the first hearing before the court, so it is unsurprising that they were lost in our haste to issue an opinion before our colleague, Judge Wald, departed from the court." *Ibid.*[3] Chief Judge Edwards thought these issues "too important to ignore once uncovered." *Ibid.* And "[a]fter considering this matter further," he concluded that there is "good reason" to believe that the initial panel was "mistaken" in its view that the Commission acted pursuant to a substantive rule requiring notice and comment rulemaking. *Ibid.*

b. Following rehearing, the court of appeals (Pet. App. 1a-19a) denied the petition for review, holding that the Commission properly denied intervention on the ground that petitioner "failed to submit the required contentions within the prescribed deadline." *Id.* at 4a. The court of appeals stated at the outset that almost all of petitioner's arguments are "plainly meritless." *Id.* at 10a. The sole issue warranting discussion was the claim that "the NRC erred in adopting and

---

[3] Judge Wald authored the initial panel decision in this case, but shortly thereafter departed from the court.

applying an 'unavoidable and extreme circumstances' test, in lieu of a 'good cause' test, to assess requests for extensions of time." *Ibid.* The court rejected that claim too, however, because it concluded that "the Commission was fully justified in adopting the disputed test and, also, because [petitioner] suffered no prejudice in the Commission's application of the new standard." *Ibid.*

The court concluded that petitioner was "simply wrong" in claiming that the Commission lacked the authority to adopt the "unavoidable and extreme circumstances" test as an adjudicatory rule. Pet. App. 11a. On this issue, the court stated that it was "in complete accord with the Seventh Circuit's position that the NRC possesses the authority 'to change its procedures on a case-by-case basis with timely notice to the parties involved.'" *Ibid.* (quoting *City of West Chicago* v. *NRC*, 701 F.2d 632, 647 (7th Cir. 1983)). The court pointed out that there can be "no claim here that [petitioner] lacked timely notice of the new 'unavoidable and extreme circumstances' standard," since the Commission announced its intent to adopt the standard in its August 1998 policy statement, and petitioner "received express notice that the new standard would be applied in the Calvert Cliffs proceeding" in the prehearing order. *Ibid.*

Next, the court of appeals rejected the argument that adoption of the unavoidable-and-extreme-circumstances standard required notice and comment rulemaking. Pet. App. 12a-14a. The standard "embodies a procedural rule." *Id.* at 12a. As the court explained, "[t]he disputed agency action * * * merely altered a standard for the enforcement of filing deadlines; it did not purport to regulate or limit [petitioner's] substantive rights." *Ibid.* Such "agency housekeeping rules"

often reflect "a judgment about what mechanics and processes are most efficient," but "[t]his does not convert a procedural rule into a substantive one." *Ibid.* (quoting *JEM Broad. Co.* v. *FCC*, 22 F.3d 320, 327-328 (D.C. Cir. 1994)). As a procedural step, the NRC may "require[] parties who failed to meet otherwise reasonable deadlines to demonstrate compelling reasons before they could obtain any extensions of time beyond prescribed deadlines." *Id.* at 13a.

The "only remaining question" was whether the NRC's "new procedural standard" satisfies arbitrary and capricious review under the APA, and the court of appeals held that the standard "easily survives [such] review." Pet. App. 14a-15a. As the court explained, the "new procedural standard did not significantly or unreasonably change the regime pursuant to which requests for extensions of time are judged," but "merely refine[d] an existing procedural standard." *Id.* at 14a. Moreover, petitioner failed to show "detrimental reliance in this case," because it "had no basis upon which to assume that * * * deadlines automatically would be waived upon request pursuant to the old good cause standard." *Id.* at 14a-15a. In addition, the Commission "fully explained the need for expedited case processing" in its policy statement. *Id.* at 15a.

Finally, the court emphasized that petitioner "has offered absolutely nothing to show how the promulgation of the new rule, even if, arguendo, in error, resulted in prejudice or other cognizable harm to them." Pet. App. 16a. The Commission granted petitioner two extensions of time; yet when the twice-extended deadline (October 1, 1998) elapsed, petitioner failed to file the requisite contentions or anything supporting another extension of time. *Id.* at 17a. Accordingly, the court concluded that "[t]here can be no doubt that, on

the record before us, [petitioner] suffered no prejudicial error when the Commission adopted the new 'unavoidable and extreme circumstances' standard." *Id.* at 19a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with the decision of any other court of appeals. Petitioner was given ample opportunity to intervene in the license renewal proceeding in this case, and failed to do so of its own volition. The court of appeals carefully considered petitioner's arguments and properly found not only that the Commission acted lawfully under the APA, but also that petitioner suffered no prejudice as a result of the agency actions about which it now complains. Review by this Court is not warranted.

1. Petitioner claims (Pet. 11) that this case presents "the following important question: whether the [APA]'s adjudication provisions apply to nuclear safety proceedings conducted under Section 189(a) of the Atomic Energy Act?"[4] The "adjudication provisions" referred to by petitioner are those governing formal, "on the record" agency hearings set forth in 5 U.S.C.

---

[4] This question subsumes the first two questions presented in the petition. See Pet. i. There is no dispute that as a general matter the APA applies to the NRC; the Atomic Energy Act (AEA), 42 U.S.C. 2231, so provides. The basic question raised by petitioner here is whether NRC license renewal proceedings are governed by the formal hearing requirements of the APA. Contrary to the suggestion of petitioner (Pet. 11, 14), this issue does not resemble the one decided in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). In *Vermont Yankee*, the Court held that the courts may not impose on administrative agencies procedural requirements that go beyond statutory demands; in this case, by contrast, the court of appeals gave effect to the agency's own procedural rules (which were consistent with statutory requirements).

554, 556, and 557. See Pet. 11, 13, 17-25. The court of appeals' decision in this case does not mention let alone purport to decide the "important" APA issue framed by petitioner in this Court, and that is not surprising.

In license renewal proceedings for nuclear power plants, the Commission follows the formal adjudicatory procedures set forth in Subpart G of Part 2 of its rules of practice. See 10 C.F.R. 2.105, 2.700; *Philadelphia Newspapers, Inc.* v. *NRC*, 727 F.2d 1195, 1202-1203 (D.C. Cir. 1984). Significantly, the Subpart G rules—which governed the proceeding in this case—provide for a formal hearing with all the protections, and then some (such as the right to pre-hearing discovery, which is not guaranteed by the APA), of a formal, APA-"on the record" hearing. Compare 10 C.F.R. 2.700-2.788 with 5 U.S.C. 554, 556-557. See also *Union of Concerned Scientists* v. *NRC*, 735 F.2d 1437, 1444-1445 n.12 (D.C. Cir. 1984) (NRC "regulations governing licensing proceedings provide for hearing procedures that comport with or even surpass those required by the APA for 'on the record' adjudication.").

Because the NRC's Subpart G rules are at least as protective as those governing "on the record" adjudications under the APA, the District of Columbia Circuit has specifically declined in the past to decide whether the APA's formal adjudication requirements govern NRC licensing proceedings. See *Nuclear Info. & Res. Serv.* v. *NRC*, 969 F.2d 1169, 1180 (D.C. Cir. 1992) (en banc); *Union of Concerned Scientists* v. *NRC*, 920 F.2d 50, 53 (D.C. Cir. 1990).[5] And in this case, the court of

---

[5] Petitioner suggests (Pet. 11) that the state of the law is in "disarray" on this issue. See Pet. 18-22. That is not so. Neither the court of appeals below nor any other decision cited by petitioner specifically addresses the question whether the APA's formal

appeals did not even mention that here-academic issue.[6] This Court typically does not consider questions that

---

hearing requirements apply to nuclear power plant license renewal proceedings. In *City of West Chicago* v. *NRC*, 701 F.2d at 641-645, the Seventh Circuit held that the APA's formal hearing requirements are not applicable in a materials license proceeding. There is no contrary decision. Petitioner quibbles with statements in various District of Columbia Circuit decisions discussing the application of the APA in NRC proceedings. But none of those decisions squarely decided the APA issue petitioner presents here; they do not conflict with the decision below (which did not discuss that issue); and any intra-circuit tension that may exist between statements in the opinions cited by petitioner may be resolved by the District of Columbia Circuit—in a case actually presenting the APA issue petitioner seeks to raise.

[6] Petitioner (Pet. 13, 18, 23-25) attempts to ground its APA argument in a footnote in the Commission's final decision. See Pet. App. 60a-61a n.4. The footnote responded to petitioner's complaint that the Commission violated the APA by not taking into account the "convenience and necessity of the parties." 5 U.S.C. 554(b). The Commission stated that it did "not doubt our obligation to treat all parties to our proceedings fairly," but emphasized that its case management initiatives had not "prejudiced [petitioner's] right to participate meaningfully" in the Calvert Cliffs adjudication. Pet. App. 60a n.4. In addition, the Commission stated that, "as a formal matter, one of the APA provisions cited by [petitioner] (5 U.S.C. §554(b)) applies only to agency proceedings required by statute to be 'on the record,'" and that "[t]he Commission's position * * * is that NRC licensing proceedings are not governed by APA requirements for formal on-the-record adjudications, except in particular situations where Congress has so mandated." *Ibid.* In reiterating its position on this issue, the Commission was simply ensuring that its use of formal procedures for license renewal proceedings—which meet or exceed those followed under the APA—would not be deemed as an abandonment of its prior position that neither the APA nor the AEA requires it to conduct an "on the record" hearing. In any event, as discussed, the court of appeals did not address the validity of the

were not addressed or decided below. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below"); *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (The Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below."). There is no reason to make an exception here.

2. The court of appeals did address the question whether the Commission properly applied its unavoidable-and-extreme-circumstances standard in this case, but that factbound contention does not warrant certiorari either. Petitioner's principal claim (Pet. 15-16) is that the Commission should have assessed petitioner's extension requests under the "good cause" standard rather than the "unavoidable and extreme circumstances" standard. The court of appeals correctly held that the Commission permissibly applied the latter standard and that, in any event, petitioner did not suffer any "prejudice or other cognizable harm" (Pet. App. 16a) as a result of the application of that standard.[7]

As the court of appeals stressed, the NRC, like other agencies, possesses the discretion to modify its procedural rules, so long as it provides "timely notice" of rule

---

Commission's position on this issue, or delve into the meaning of the footnote in the agency decision on which petitioner now relies.

[7] Even if the Commission improperly applied the unavoidable-and-extreme-circumstances test it properly rejected petitioner's application for failure to meet specificity requirements in stating its contentions. See Pet. App. 69a-73a; *id.* at 59a ("[T]hroughout this proceeding, [petitioner] has provided the Board and the Commission only the scantiest of details regarding its health-and-safety or environmental concerns."). That provides an additional reason for denying review. See note 2, *supra*.

changes. Pet. App. 11a. The courts of appeals are "in complete accord" on this point. *Ibid.* (citing *City of West Chicago* v. *NRC*, 701 F.2d at 647). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. at 544 (a "very basic tenet of administrative law [is] that agencies should be free to fashion their own rules of procedure"); *American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) ("It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it."). And the Commission plainly provided interested parties—including petitioner—timely notice of the unavoidable-and-extreme-circumstances standard, both in the August 1998 policy statement and its scheduling order for the Calvert Cliffs license renewal proceeding. See Pet App. 11a.

The court of appeals also correctly stated that the APA's notice-and-comment rulemaking requirements do not apply to procedural rules. See 5 U.S.C. 553(b)(3)(A); *Lincoln* v. *Vigil*, 508 U.S. 182, 196 (1993). Furthermore the court correctly found that the Commission acted lawfully in taking steps to expedite nuclear power plant license renewal proceedings. The Commission's new extension-of-time standard lies well within the "wide latitude an agency has in designing its own proceedings." Pet. App. 15a (citing *Vermont Yankee*, 435 U.S. at 524-525). And the Commission provided ample explanation for adopting this new standard and, more generally, attempting to improve and streamline the procedures governing license renewal proceedings. See *id.* at 53a-54a.

Moreover, application of the unavoidable-and-extreme-circumstances standard did not prejudice petitioner. Pet. App. 16a-19a. See 5 U.S.C. 706 ("[D]ue account shall be taken of the rule of prejudicial error."). As the court of appeals pointed out, petitioner received "two extensions of time in which to file contentions" (Pet. App. 19a), and when the deadline for contentions (as extended) ultimately arrived, petitioner filed neither contentions nor an additional supported request for extending the deadline—a third time. *Id.* at 17a. Instead of an extension-of-time motion, petitioner filed a "Motion to Vacate and Re-schedule the Pre-Hearing Conference" that invoked a supposed right to delay contention-filing until after Baltimore Gas & Electric Company answered then-pending inquiries from the NRC staff. But, as the court of appeals explained, "[i]t is clear that, under prevailing law" petitioner was not entitled to any pre-contention "discovery." *Ibid.*

In short, petitioner cannot plausibly attribute its failure to file timely and adequate contentions to the challenged extension standard, and petitioner has provided no reason why it is necessary for this Court to review the court of appeals' factbound determination that prejudice was lacking in this case.

3. The NRC has broad discretion to ensure that its adjudications move along promptly and efficiently from the perspective of all interested parties, and to administer those procedures as it deems appropriate in individual proceedings. Here, the Commission acted reasonably—and with notice to all—in its effort to manage and schedule the Calvert Cliffs license renewal proceeding. Its actions, moreover, resulted in no "prejudice or other cognizable harm" to petitioner. Pet. App. 16a. Despite early availability of the license renewal application (more than two months prior to the

formal hearing notice), advance warning of the Commission's determination to resolve license renewal cases expeditiously and to allow extensions of time only in "unavoidable and extreme" circumstances, and an agency scheduling order that coupled with extensions of time gave petitioner at least 75 days after the hearing notice for specifying any safety or environmental concerns (*id.* at 13a, 63a), petitioner failed to present a single particularized complaint. In these circumstances, the court of appeals correctly determined that petitioner's intervention request was properly denied by the Commission, and further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
MARK HAAG
Attorney

KAREN D. CYR
General Counsel
JOHN F. CORDES, JR.
Solicitor
E. LEO SLAGGIE
Special Counsel of the Solicitor
MARJORIE S. NORDLINGER
Senior Attorney
Nuclear Regulatory Commission

NOVEMBER 2000